Petition

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No. _____

IN THE

Supreme Court of the United States

October Term, 1981

THE MOSES H. CONE MEMORIAL HOSPITAL, *Petitioner*

V.

MERCURY CONSTRUCTION CORPORATION, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI

Jack W. Floyd
SMITH MOORE SMITH SCHELL & HUNTER
P.O. Box 21927
Greensboro, North Carolina 27420
(919) 378-1450
Attorney for Petitioner

Of Counsel:

Stephen P. Millikin
Douglas W. Ey, Jr.
Alan W. Duncan

QUESTIONS PRESENTED

1. Does a district court have discretion to stay its proceedings in a diversity case pending resolution of identical issues by a state court having concurrent jurisdiction in a prior civil action that includes all necessary parties to the underlying disputes?

2. Is an order staying proceedings in a district court pending resolution of a prior state court action directly appealable under 28 U.S.C. § 1291?

3. Should this Court exercise its supervisory powers under Supreme Court Rule 17.1 (a) when a court of appeals departs from the usual and accepted course of judicial proceedings by adjudicating substantive matters not yet ripe for appellate determination and by deciding as an appeal a case addressed procedurally as a writ of mandamus?

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No. _____

IN THE

Supreme Court of the United States

October Term, 1981

The Moses H. Cone Memorial Hospital, *Petitioner*

v.

Mercury Construction Corp., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, The Moses H. Cone Memorial Hospital, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit entered on August 12, 1981.

OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit, not yet reported, appears in the Appendix. (A 1) The unreported Memorandum Opinion of the District Court for the Middle District of North Carolina also appears in the Appendix. (A 33)

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 12, 1981. A petition for rehearing was denied on November 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 4. Failure to arbitrate under agreement.
Text set forth in Appendix. (A 47)

28 U.S.C. § 1291. Final decisions of district courts.
The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292. Interlocutory decisions.
Text set forth in Appendix. (A 47)

STATEMENT OF THE CASE

This litigation consists of a civil action initiated by petitioner, The Moses H. Cone Memorial Hospital (Hospital), in the Superior Court of Guilford County, North Carolina, and a second civil action subsequently initiated by respondent, Mercury Construction Corp. (Mercury), in the United States District Court for the Middle District of North Carolina. The cases raise identical issues of fact and law and the jurisdiction of the state and federal courts is concurrent.

On October 8, 1981, petitioner Hospital filed a declaratory judgment action in the state court against respondent Mercury and J.N. Pease Associates (Pease) requesting a determination of the rights and obligations of the parties under contracts relating to a construction and renovation project at the Hospital. Pease was the architect and Mercury was the general contractor on the project. The Hospital asked the court to declare that the claims asserted by

Mercury against Hospital were not subject to arbitration, that Mercury's claims were invalid, and that Mercury and Pease were responsible if any damages were suffered by Mercury.

On October 27, 1980, Mercury filed a civil action in the federal district court in the form of a petition seeking an order compelling arbitration under 9 U.S.C. § 4, a provision of the Federal Arbitration Act. Mercury invoked the jurisdiction of the district court under 28 U.S.C. § 1332 on the grounds of diversity of citizenship, Mercury being a Delaware corporation with its principal place of business in Alabama and Hospital being a North Carolina nonprofit corporation with its principal place of business in that state. Diversity existed between the Hospital and Mercury, but not between the Hospital and Pease, a North Carolina corporation.

Concurrently, Mercury removed the pending state declaratory judgment action to the federal court under 28 U.S.C. § 1441 (c), contending that Hospital asserted "separate and independent" claims against Pease and Mercury. The district court rejected that contention and ordered remand on December 24, 1980, finding that the declaratory judgment action involved a " 'single wrong...arising from an interlocked series of transactions.' " (A 35) On the same day, the district court granted Hospital's motion to stay further proceedings on Mercury's petition to compel arbitration pending resolution of the prior state court action, which raised the identical arbitrability issue. [1] The district court neither reached nor determined the merits of the arbitrability question.

On January 6, 1981, Hospital filed a motion for summary judgment in the state declaratory judgment action, and asked for a hearing on this and all other pending motions during the week of February 9, 1981. Mercury then filed a petition in the Court of Appeals for the Fourth Circuit seeking a writ of mandamus requiring the district court to vacate its stay order and to rule on Mercury's petition to compel arbitration. Alternatively, Mercury asked that its petition for writ of mandamus be considered a notice

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[1] The district court relied on *E.C. Ernst, Inc. v. Potlatch Corp.*, 462 F. Supp. 694 (S.D.N.Y. 1978), a case directly on point. (A 38) *Ernst* held that an order staying proceedings on a petition to compel arbitration was appropriate pending resolution of a prior civil action in Arkansas state court raising the arbitrability issue. The court determined that the Federal Arbitration Act did not compel it to exercise its diversity jurisdiction or remove its discretion to stay its own proceedings. *Id.* at 700-01.

of appeal. (A 41) Mercury expressly stated that it chose to appeal only under 28 U.S.C. § 1291, and not pursuant to any subsection of 28 U.S.C. § 1292.(A 44 n.1)The Hospital moved to dismiss the "alternative" appeal.

On February 6, 1981, the Fourth Circuit ordered that a hearing be held only on Mercury's application for mandamus before a three-judge panel on February 12, 1981, and concurrently granted Hospital leave to appear at the hearing. (A 39) The Fourth Circuit issued no order authorizing the Hospital to answer Mercury's application for the writ.[2] At the hearing on the petition for writ of mandamus, the panel directed the parties to submit simultaneous briefs within ten days. (A 40) That panel never rendered a decision or filed an opinion.

The parties were informed on May 15, 1981 that an en banc rehearing would be held on June 1, 1981. On August 12, 1981 the Fourth Circuit filed an en banc opinion written by Judge Russell. Judges Hall and Widener dissented.[3]

The majority found that Mercury was entitled to a direct appeal and thus chose not to rule on the mandamus question. The majority then devoted a substantial portion of its opinion to an analysis of the Federal Arbitration Act. Despite the absence of briefs, argument or any lower court hearing or decision on the question, the majority determined that Mercury had a "plain, indisputable right" to arbitration of its claims against the Hospital under the Act. (A 14) Finally, the majority assessed the propriety of the district court's stay order in light of the opinions of this Court in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978). The majority found that Justice Blackmun's concurring opinion controlled, and concluded that no exceptional circumstances existed to justify the district court's stay order.[4] The Fourth Circuit reversed and remanded the cause to the district court with directions to proceed "in conformity herewith." (A 21) Thus, the majority holding was three-tiered: first, that the stay order was directly appealable;

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[2] Under Federal Rule of Appellate Procedure 21(b), no response to a writ of mandamus is permitted without an order of the court of appeals authorizing it.

[3] The original three-judge panel, which rendered no decision or opinion, was composed of Judges Russell, Hall and Widener.

[4] The majority rejected as "faulty" the analysis of *Will* adopted in *E.C. Ernst, Inc. v. Potlatch Corp.*, *supra* n. 1. (A 18 n.1)

second, that the Hospital and Mercury were required to arbitrate their disputes; and third, that the stay order was improper. The Hospital's petition for rehearing was denied, with an opinion and a dissent accompanying the order. (A 29)

REASONS FOR GRANTING THE WRIT

1. The majority opinion below conflicts with prior decisions of this Court and with decisions from other circuits because it divests the district court of discretion to stay proceedings pending comprehensive resolution of identical issues in a state court having concurrent jurisdiction.

The reversal by the Fourth Circuit of the district court's stay order is in direct conflict with *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). Based on fundamental considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," the Court in *Colorado River* prescribed a balancing test for determining the propriety of dismissing federal court actions in deference to parallel state court proceedings. *Id.* at 817. The district courts must weigh "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" against any "exceptional" circumstances that militate against concurrent federal proceedings.[5] *Id.* at 817-18.

Colorado River required the exercise of sound discretion by the district court in applying the prescribed balancing test. The district court in the instant case was confronted with an analogous situation: determining the propriety of a *stay* of federal proceedings in deference to a parallel state case. Relying upon *E. C. Ernst, Inc. v. Potlatch Corp.*, 462 F. Supp. 694 (S.D.N.Y. 1978), a case directly on point, the district court found that a stay of its own proceedings pending resolution of the remanded state court action was appropriate. (A 38) Several of the "exceptional circumstances" outlined in *Colorado River* for consideration in assessing the appropriateness of a dismissal were present in both *Ernst* and the

[5] The Court set forth several examples of such "exceptional circumstances:" inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums. 424 U.S. at 818. The Court advised that "a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." *Id.* at 818-19.

instant case.[6] The state court obtained jurisdiction first over the "identical issue of arbitrability of the claims" raised later in Mercury's federal action. (A 38) Additionally, all parties to the underlying construction dispute -- Mercury, Hospital and the architect -- were parties to the state court action, making comprehensive disposition of the litigation available only in that forum. The district court's memorandum opinion noted that the claims involved arose " 'from an interlocked series of transactions' " implicating all parties to the state court action. (A 36)

The district court exercised its discretion to conclude that a stay was appropriate. By addressing Hospital's motions to remand and to stay simultaneously, the district court was able to review the allegations of the state declaratory judgment action. The extensive quotations from Hospital's state court complaint in the district court's memorandum opinion reflect careful consideration of the merits of that action. The district court recognized the presence of "exceptional circumstances" outlined in *Colorado River* and *Ernst* and concluded that they outweighed the need to exercise diversity jurisdiction. By remanding the declaratory judgment action to its original forum and by exercising its discretionary power to enter a stay order, the district court determined that the state court was the proper forum for comprehensive resolution of all disputes among the three parties, including all arbitrability questions.

The Fourth Circuit reviewed the stay order on direct appeal and determined both that the district court had found no "exceptional circumstances" justifying its order and that the record contained none. (A 18) The Fourth Circuit did not decide that the district court abused its discretion in entering the stay order. By concluding that there were no "exceptional circumstances" justifying a stay, the Fourth Circuit held instead that the district court had no discretion to enter the stay order. This conclusion violates the *Colorado River* requirement that the district court exercise its discretion and "carefully considered judgment" in applying the balancing test. 424 U.S. at 818. Moreover, the majority opinion refused even to acknowledge the "exceptional circumstances" expressly enumerated by *Colorado River* and *Ernst* that are clearly present in

[6] The *Ernst* court had found that "most of the exceptional circumstances outlined by the Supreme Court in *Colorado River* are present here," and concluded that "a stay rather than a dismissal is appropriate here in order to ensure a just disposition of this litigation should anything prevent a prompt state court determination." 462 F. Supp. at 700-01.

this case: the assumption of jurisdiction first by the state court, the desirability of avoiding piecemeal litigation and the availability of a comprehensive disposition of all questions in the state court.

The source of the conflict between the majority opinion below and *Colorado River* is the Fourth Circuit's attempt to reconcile the evenly divided opinions of this Court in *Will v. Calvert Fire Insurance Co., supra.* As in the instant case, the ultimate issue in *Will* was the propriety of a stay order issued by a district court pending parallel state court proceedings. The Seventh Circuit had struck down Judge Will's stay order by issuing a writ of mandamus. Justice Rehnquist's plurality opinion held that "a district court's decision to defer proceedings because of concurrent state litigation is generally committed to the discretion of that court," even when matters of substantive federal law are involved. 437 U.S. at 664-65. Noting that a district judge is "entrusted with wide latitude in setting his own calendar," the plurality found that issuance of the writ of mandamus by the Seventh Circuit was not proper. *Id.* at 665. Emphasizing that an aspect of the federal suit was committed to the exclusive jurisdiction of the federal court, the four dissenters declined to sanction deference in favor of state proceedings.[7] Chief Justice Burger concluded that "a federal court remains under an obligation to expeditiously consider and resolve those claims which Congress explicitly reserved to the federal courts." *Id.* at 668. (Burger, C.J., dissenting).

The Fourth Circuit found that Justice Blackmun's brief concurring opinion in *Will* controlled. The majority concluded that Justice Blackmun agreed with the result favored by the *Will* dissenters except to the extent that he would have left the determination whether *Colorado River* "exceptional circumstances" existed to the district court. (A 16) This conclusion did not cause the Fourth Circuit to defer to the judgment of the district court in the instant case, as might be expected; instead, the Fourth Circuit looked to the opinion written by Judge Will on remand[8] and perceived that he reinstituted the

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[7] A counterclaim in the federal action raised issues which were committed to the exclusive jurisdiction of the federal courts under section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78 (aa). Therefore, the state and federal courts did not have congruent jurisdiction of all aspects of the case. That is not the case here. *See* note 12 *infra.*

[8] 459 F. Supp. 859 (N.D. Ill. 1978).

stay of the federal court action *only* because it constituted no more than a "reactive defensive maneuver," and a "contrived" federal claim. (A 17)

This interpretation of Judge Will's opinion effectively became the controlling authority as the Fourth Circuit then sought to ascertain whether either Hospital's state court action or Mercury's federal court action was a " 'reactive' or 'tactical maneuver.' " (A 17) The majority concluded that the state action initiated by Hospital fit that category, making a stay inappropriate. In reaching this conclusion, the majority substituted its reading of an incomplete record for the discretionary judgment of the district court. The Fourth Circuit did not have the benefit of the district court's evaluation of Hospital's state court action contained in the remand order and memorandum opinion because the record in that case, including the order and opinion, had been returned to the state court. Under *Colorado River*, the function of the district court is to apply the prescribed balancing test, and it was in the best position to assess the merits of the action and the intentions of Hospital in filing it.

Following the mandate of *Colorado River*, the dissents below emphasized the deference to be accorded to the district court's discretionary application of the balancing test. (A 23) The proper standard for reviewing an exercise of discretion is determining whether that discretion has been abused. Though it reversed the stay order, the majority opinion did not find an abuse of discretion. The majority opinion paid lip service to *Colorado River*, but violated its mandate by denying the existence of any "exceptional circumstances" and by concluding that the district court had no discretion to stay its proceedings. The majority opinion's strained extension of Justice Blackmun's concurrence in *Will* caused it effectively to disregard *Colorado River*.

The majority opinion below demonstrates that the product of this Court's even division in *Will* is substantial confusion concerning the power of district court judges to manage their dockets and to defer to prior, more comprehensive state court actions. The Fourth Circuit decision is in direct conflict with decisions from other circuits, perhaps most notably the opinion of the Seventh Circuit in *Calvert Fire Insurance Co. v. American Mutual Reinsurance Co.*, 600 F. 2d 1228 (7th Cir. 1979), which reviewed the decision of Judge Will relied upon so heavily by the Fourth Circuit in the instant case.[9] In affirming Judge Will's reinstitution of the stay order, the

[9] The Seventh Circuit decision, which ended the *Will* series of cases, was not

Seventh Circuit expressly stated that the standard to be applied was "the traditional 'balancing test,' " in which the "district judge's exercise of discretion should be based on his weighing of a combination of factors." *Id.* at 1233-34. The Seventh Circuit listed the factors articulated in *Colorado River. Id.*

In *State Farm Mutual Automobile Insurance Co. v. Scholes*, 601 F. 2d 1151 (10th Cir. 1979), the Tenth Circuit quoted extensively from Justice Rehnquist's plurality opinion in *Will* and found that the lower court had properly exercised its discretion in staying its proceedings pending final determination of a parallel state court action. *See also, Levy v. Lewis*, 635 F. 2d 960 (2d Cir. 1980); *Centronics Data Computer Corp. v. Merkle-Korff Industries*, 503 F. Supp. 168 (D.N.H. 1980); *Bagley v. Florida Nat'l Bank*, 508 F. Supp. 11 (M.D. Fla. 1980); *American Motorists Insurance Co. v. Phillip Carey Corp.* , 482 F. Supp. 711 (S.D.N.Y. 1980); *Zellen v. Second New Haven Bank*, 454 F. Supp. 1359 (D. Conn. 1978); *E.C. Ernst, Inc. v. Potlatch Corp., supra.*[10]

Distinctions between this case and both *Colorado River* and *Will* raise two important questions that have not been addressed by this Court. First, in this case Hospital sought a *stay*, while the *Colorado River* Court approved a *dismissal* in deference to state proceedings. A stay is by nature tentative, and a less drastic remedy than a dismissal.[11] Should the requirement of "exceptional circumstances" be less stringent when only a stay is sought? Second, the absence of any element of exclusive federal jurisdiction in the instant case is an important distinction from *Will* because the *Will* dissenters focused on the presence of exclusive jurisdiction in objecting to deference. Even though the majority opinion below doubted the inclination of the North Carolina courts to apply the Federal Arbitration Act, there is no question that the North Carolina courts will effectuate the uniform federal policies

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(Footnote 9, con't.)
cited or referred to by the Fourth Circuit below.

[10] Prior to both *Colorado River* and *Will* several circuits had adopted analyses of the district court's power to stay its own proceedings inconsistent with that of the Fourth Circuit in the instant case. *See, e.g., Weiner v. Shearson, Hammill & Co.*, 521 F. 2d 817 (9th Cir. 1975); *PPG Industries, Inc. v. Continental Oil Co.*, 478 F. 2d 674 (5th Cir. 1973); *Mottolese v. Kaufman*, 176 F. 2d 301 (2d Cir. 1949); Annot., 5 A.L.R. FED. 10 (1970).

[11] The distinction between stay orders and dismissals is discussed in detail *infra*, at page 12.

embodied in the Act.[12] Would the absence of any element of exclusive federal jurisdiction reconcile the divergent opinions in *Will* and compel the conclusion that a stay is appropriate? The situations in which jurisdiction is concurrent in parallel proceedings far outnumber the cases in which a federal court possesses an element of exclusive jurisdiction.[13] This case provides a ready vehicle for resolution of these significant questions left open by *Will* and *Colorado River*.

The majority opinion below strictly circumscribes the power of the district courts to manage and control their dockets, in conflict with opinions of this Court and other circuits. In view of the explosion of litigation in the federal courts, the need to provide for efficient implementation of judicial resources, and the desirability of preserving amicable relations between state and federal courts, this case is particularly significant.

2. The Fourth Circuit holding that an order staying district court proceedings pending resolution of a prior state court action is directly appealable under 28 U.S.C. § 1291 conflicts with decisions from other circuits and recent opinions of this Court limiting appellate jurisdiction.

The Fourth Circuit reviewed the stay order on direct appeal under 28 U.S.C. § 1291, without addressing the mandamus question.[14] (A 6) Section 1291 gives the courts of appeals

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[12] *See Burke County Pub. Schools Bd. of Educ. v. Shaver Partnership*, 303 N.C. 408, 279 S.E. 2d 817 (1981) (holding that the Federal Arbitration Act must be applied by the North Carolina courts to transactions within interstate commerce).

[13] In *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), the Court stated that "nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule." *Id.* at 507-08.

[14] The majority opinion's statement that Mercury sought review under *both* 28 U.S.C. § 1291 and § 1292(a) is clearly erroneous in light of Mercury's express abandonment of an interlocutory appeal.(A 44 n.1) Moreover, the majority opinion's statement that Mercury is "entitled to a direct appeal," without mention of an interlocutory appeal, and its citation of *Amdur v. Lizars*, 372 F. 2d 103 (4th Cir. 1967), reflect its view that § 1291 sanctions an appeal. (A 6)

"jurisdiction of appeals from all final decisions of the district courts." The courts of appeals have divided on the question whether a district court order staying activity in a federal court pending resolution of parallel state court litigation is appealable under § 1291 as a "final decision." The Third, Fifth and Tenth Circuits have held expressly that this variety of stay order is not appealable under § 1291. *Jensenius v. Texaco, Inc.*, 639 F. 2d 1342, 1343 (5th Cir. 1981); *State Farm Mutual Automobile Insurance Co. v. Scholes, supra*, at 1153-54; *Cotler v. Inter-County Orthopaedic Ass'n*, 526 F. 2d 537 (3d Cir. 1975).[15] In the instant case, the Fourth Circuit relied on its decision in *Amdur v. Lizars, supra* n. 14, finding that the stay order was "in the usual case, not appealable," but that in the circumstances presented, it amounted to "a dismissal of the proceedings," and was thus "final" and appealable. 372 F. 2d at 105-06.

Recent decisions of this Court interpreting the "final decision" requirement of § 1291 conflict with both the analysis and the conclusion of the Fourth Circuit. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) the Court rejected the "death knell" exception to the finality requirement of § 1291, which had been fashioned by several courts of appeals to permit appeal of an otherwise interlocutory order "if the court concludes that the ruling, as a practical matter, makes further litigation improbable ..." *Id.* at 471. The Court found that "the principal vice of the 'death knell' doctrine" was its authorization of "*indiscriminate* interlocutory review of decisions made by the trial judge." *Id.* at 474 (emphasis by the Court). The Court emphasized that Congress enacted the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b), to meet the "recognized need for prompt review of certain nonfinal orders" upon certification by the trial judge. *Id.* The screening procedure prescribed by Congress in §1292(b) ensured that review would be confined to appropriate cases and avoided "time-consuming jurisdiction determinations in the court of appeals." *Id.* at 474-75. The "death knell" doctrine improperly circumvented the restrictions imposed by Congress on appellate review of interlocutory orders.

[15] The Temporary Emergency Court of Appeals held such an order appealable under § 1291 in *Sun Oil Co. v. Federal Energy Admin.*, 572 F. 2d 867 (Temp. Emer. Ct. App. 1978). The position of the Second Circuit is not clear. *See Federman v. Empire Fire & Marine Ins. Co.*, 597 F. 2d 798, 808 (2d Cir. 1979) (order appealable); *Mottolese v. Preston*, 172 F. 2d 308 (2d Cir. 1949) (order not appealable).

In *Coopers & Lybrand*, the Court also analyzed the "collateral order" exception to the finality requirement of § 1291 articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), stating:

> "To come within the 'small class' of decisions excepted from the final judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." 437 U.S. at 468.

The Court in *Coopers & Lybrand* held that the district court order denying class certification did not meet the three "collateral order" requirements because the order was subject to revision in the district court, it involved considerations "enmeshed in the factual and legal issues," and the order was subject to effective review after final judgment. *Id.* at 469.

The "collateral order" exception to the finality requirement of § 1291 was analyzed again recently in *Firestone Tire & Rubber Co. v. Risjord*, 449 U. S. ____, 66 L. Ed. 2d 571, 101 S. Ct. 669 (1981), in which the Court held that an order denying a motion to disqualify counsel was not an appealable final decision. The Court placed special emphasis on the policy considerations underlying the finality requirements: encouraging the exercise of the deference that appellate courts owe to the trial judge, avoiding a succession of piecemeal appeals from various rulings, and promoting efficient judicial administration. The *Coopers & Lybrand* and *Firestone* decisions mandate a strict construction of the finality requirement of § 1291, thus conflicting with the Fourth Circuit's analysis of the appealability of stay orders.

Furthermore, it is important to recognize that stay orders are by nature tentative, not final decisions. In *Will v. Calvert Fire Insurance Co., supra*, Justice Rehnquist stated that "[s]ince [the district judge] did not dismiss the action, Calvert remained free to urge reconsideration of his decision to defer based on new information as to the progress of the state case; to this extent, at least, deferral was *not* equivalent to a dismissal. " 437 U.S. at 665 (emphasis in original). Concurring in *State Farm Mutual Automobile Insurance Co. v. Scholes, supra*, Circuit Judge Logan noted that "[a] stay...leaves the judge free to reconsider his decision to defer or to take other action." 601 F. 2d at 1156. *See also, E.C. Ernst, Inc. v.*

Potlatch Corp., supra, at 701; *Chintala v. Diamond Reo Trucks, Inc.,* 393 F. Supp. 1392, 1394 (E.D. Pa. 1975). Since a stay order is subject to revision by the district court at any time, it cannot meet the "conclusive determination" requirement of the "collateral order" exception. *Coopers & Lybrand v. Livesay, supra,* at 469.

Two appropriate avenues are clearly available to obtain review of district court stay orders: § 1292(b) certification and mandamus. Mercury voluntarily chose not to request certification of the question by the district court under § 1292(b). The writ of mandamus was sought in the first instance by Mercury but was not considered by the Fourth Circuit. Professor Moore concludes that review of stay orders by these two avenues is "quite sufficient." 9 *Moore's Federal Practice* ¶ 110.20 [4.-2], at 252 (2d ed. 1980).

The Fourth Circuit's treatment of § 1291 expands federal appellate jurisdiction indiscriminately, when the clear intent of Congress was to circumscribe federal appellate review. The Court should issue certiorari in order to resolve the conflict among the circuits on the question of the appealability of an order staying action in federal court pending resolution of parallel state court proceedings.

3. The Fourth Circuit abandoned the usual course of judicial proceedings, misled the litigants as to the nature of the matters under review and denied the parties an opportunity to be heard on the merits.

This Court should exercise its power of supervision over the federal courts to remedy the Fourth Circuit's wholesale diversion from the accepted and usual course of judicial proceedings in this case. Rules of the Supreme Court of the United States, Rule 17.1(a); *New York City Transit Authority v. Beazer,* 440 U.S. 568, 570-71 (1979). Argument was ordered initially on Mercury's application for a writ of mandamus before a three-judge panel, and leave was granted concurrently for Hospital to appear at the hearing. Because response to the petition for mandamus was forbidden by Federal Rule of Appellate Procedure 21(b) in the absence of authorization by the Fourth Circuit, Hospital had filed only a motion to dismiss the "alternative" appeal.

At the February 12, 1981 hearing on the mandamus question, the parties were directed to submit simultaneous briefs within ten days. Without having the benefit of a decision by the panel, the parties were called to an en banc rehearing on June 1, 1981, during which

the appealability and mandamus questions again were the only matters addressed. Nevertheless, the majority disposed of mandamus in one line of its opinion, determined that a direct appeal was appropriate, and proceeded to the merits of the arbitrability question.

The Fourth Circuit apparently adopted an expedited argument schedule and irregular briefing format because of the "extraordinary" nature of the writ sought by Mercury. Yet the majority, despite all indications to the contrary, ultimately treated the case as an appeal without having accorded the parties the usual appellate procedures. No order was ever entered suspending the appellate rules under Rule 2. The normal briefing pattern, requiring an appellant's brief followed by a reply in advance of oral argument, was abandoned.

A large portion of the majority opinion below is devoted to analysis of questions involving the application of the Federal Arbitration Act. The majority concluded that "the right of Mercury to...an order of arbitration under section 4 of the Act is beyond dispute," despite the complete absence of briefs, argument, evidence or a hearing in either the district court or the Fourth Circuit on the merits of the arbitrability question.[16]

In making this determination the majority not only adjudicated matters not properly before it, but also denied Hospital its right to the hearing guaranteed by the Federal Arbitration Act, in effect denying due process. Section 4 of the Act provides for a hearing in the trial court on a petition to compel arbitration. Although the statute does not empower a court of appeals to hold a de novo hearing, the majority opinion below reflects a trial at the appellate level on the merits of the arbitrability question without the opportunity for evidence, argument or briefs.

The onerous nature of this deprivation of an opportunity to be heard becomes even more apparent when the remaining provisions of § 4 are considered. The majority opinion below asserts that under the Federal Arbitration Act there are no issues for jury determination in this case. (A 19) This overlooks the plain language of § 4, which provides for a jury determination "[i]f the

[16]In his dissent below, Judge Hall noted that "[t]he majority opinion, which in effect directs arbitration, will come as a surprise to all parties. No one argued that this court should decide that issue." (A 23 n.1) The Statement of Issues to be Presented on Appeal, filed by Mercury on January 14, 1981, includes only the question whether the district court properly entered its stay order. (A 46)

making of the arbitration agreement or the failure, neglect,or refusal to perform the same be in issue." The Fourth Circuit's precipitate ruling on the arbitrability question deprives Hospital of any opportunity to demonstrate that it is entitled to a jury trial under the statute. The majority opinion considered only the selected portions of § 4 that appear to establish a "right" to arbitration for Mercury, overlooking the provisions of that section providing protections to a party justifiably opposing a petition to compel arbitration. This deprivation of rights and protections granted by Congress is fundamentally unfair.

By refusing to accord Hospital its statutory right to a full and fair hearing and by substituting a highly irregular briefing format and argument schedule, the Fourth Circuit in turn deprived itself of the opportunity to weigh alternative arguments on the several arbitration questions addressed and decided in the opinion. The majority opinion chose to address important questions of statutory interpretation without the benefit of briefs citing relevant authorities and setting forth alternative analyses of the appropriate roles of courts and arbitrators under the Federal Arbitration Act.[17] Moreover, the absence of a complete record, full hearings and argument caused the Fourth Circuit to attribute fallacious arguments and deleterious intentions to Hospital and to misapprehend arguments which Hospital never had an opportunity to make.

By requiring the parties to follow a tortured procedural path and by ruling on the merits of the arbitrability question, the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. The Fourth Circuit has sanctioned a course of judicial proceedings that misleads litigants as to the nature of the review being undertaken, deprives litigants of the procedures prescribed in the Appellate Rules and denies litigants a fair opportunity to be heard.

[17] For example, the majority opinion's conclusion that Mercury is not only entitled to an order compelling arbitration, but also that "the right of Mercury to a stay of [state] proceedings...is beyond dispute" (A 13) ignores the plain language of the Act. The stay of proceedings provided for in 9 U.S.C. § 3 may be issued only by "the court in which such suit is pending," which is the North Carolina Superior Court. The Act does not empower any federal court to halt proceedings in any state court. A stay of state court proceedings by a federal court must conform to the requirements of the Anti-Injunction Statute, 28 U.S.C. § 2283, which the majority failed to consider.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Jack W. Floyd
SMITH MOORE SMITH SCHELL & HUNTER
Post Office Box 21927
Greensboro, North Carolina 27420
Telephone: (919) 378-1450
Attorney for Petitioner

OF COUNSEL:

Stephen P. Millikin
Douglas W. Ey, Jr.
Alan W. Duncan

Appendix

APPENDIX

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UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 81-1009

In Re:

Mercury Construction Corporation, *Petitioner*

No. 81-1042

Mercury Construction Corporation, *Appellant,*

- versus -

The Moses H. Cone Memorial Hospital, *Appellee.*

Appeals from the United States District Court for the Middle District of North Carolina, at Greensboro. Hiram H. Ward, District Judge.

Heard En Banc: June 1, 1981. Decided: August 12, 1981

RUSSELL, Circuit Judge:

The appellant Mercury Construction Company (hereafter Mercury)[1] sought in this action arbitration under the Federal Arbitration Act[2] of certain disputes between it and the Moses H. Cone Memorial Hospital (hereafter Hospital),[3] under a construction contract between Mercury and the Hospital. Federal jurisdiction was properly premised on diversity. The district court denied arbitration, pending disposition of a state action by the Hospital against Mercury and J.N. Pease Associates, (hereafter Architect),[4] for declaratory judgment denying arbitration. Mercury seeks relief both by way of a petition for mandamus and by appeal. We reverse.

A summary of the facts leading up to the two actions is necessary to an understanding of the issues. In stating these facts, we have followed the allegations of the parties in their respective pleadings or presentations to the Court. On July 15, 1975, Mercury and the Hospital entered into a construction contract for Hospital additions. The agreed contract price was several million dollars. The contract, concededly drafted by the attorneys, or agents for the Hospital, includes a very broad arbitration clause covering "[a]ll claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof," subject to the requirement that any such claim shall first be submitted to the "Architect," as defined in the contract, and that no demand for arbitration shall be made "until the earlier" of the Architect's written decision on the claim or "the tenth day after the parties have presented their evidence to the Architect or have been given a reasonable opportunity to do so, if the Architect has not rendered his written decision by that date." The time for filing any claim is declared to be "within a reasonable time after the claim, dispute or other matter in question has arisen, and in no event shall be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be

[1] Mercury is a Delaware corporation with its principal place of business in Alabama.

[2] 9 U.S.C. § 1, *et seq.*

[3] The Hospital is chartered under the laws of North Carolina.

[4] The Architect is a North Carolina corporation with its principal place of business in Charlotte, North Carolina.

barred by the applicable statute of limitations."

The Architect for the project is designated and identified in the contract. He was selected by the Hospital and was declared in the contract to be "the Owner's representative during construction and until final payment," to whom, as the "interpreter of the contract" "[a]ll papers required to be delivered to the Owner" should be delivered. to whom "[a]ny notice to or demand upon the Owner [should] be . . . given," and to whom any "[c]laims, disputes and other matters in question [should] be referred initially...for decision."

Construction under the contract began in July, 1975 and was to be completed within 1200 consecutive calendar days (or approximately 40 months). Because of change orders and other problems work time extension of 334 days was agreed upon. This meant that the contract time for completion was fixed at October 14, 1979. In October, 1977, as work under the contract was proceeding, Mercury asserts in an affidavit of its Senior Construction Manager, not contested in the record by the Hospital, that "at a meeting with the Architect and the Owner, Mercury was requested to hold its claim for delay and impact costs until after the work was completed. Mercury agreed to do this." There was substantial completion of the project on February 12, 1979 and final inspections were had on June 12, 1979. Various "punch list items," however, continued to be worked on thereafter. The record does not indicate when these "punch list items" were finally completed.

At any rate, in January, 1980, Mercury submitted to the Architect its claim for additional payment on account of "delays and impact inefficiencies," etc., which Mercury contends under the agreement of October, 1977 with the Architect, was to be submitted only after the work had been completed. According to the Hospital's claims, the Architect reviewed this claim with Mercury over a period of several months and apparently succeeded in inducing Mercury to reduce its claim substantially. The Hospital claims it was completely ignorant of all this, however, until April 17, 1980, at which time, according to its allegations, its Architect "furnished to Cone Hospital various written materials by way of information, including a copy of a narrative statement of the Mercury claims."[5]

[5] Mercury has submitted an affidavit that, on information and belief, the Architect made a favorable decision on at least certain parts of Mercury's claims.

However, the Hospital avers that its counsel took over the discussions of the claims with Mercury in May, 1980. Hospital's counsel stated to Mercury's representative, according to Mercury's affidavits, that the businessmen who ran the Hospital "would need additional information regarding the claim before undertaking negotiations in earnest." In order to provide this information, a meeting was held in Birmingham, Alabama, on August 12, 1980. Present were counsel for the Hospital, one of its trustees, representatives of the Architect, and representatives of Mercury, including its counsel. At that conference, Mercury went over its claim in detail with the parties and offered the Hospital access to its files. The Hospital asked that copies of the files be mailed to its expert who had been employed to assist it in assessing the claim but who was unable to attend that meeting because of a schedule conflict. It was further agreed at this meeting that, provided that Hospital's expert had completed his review of the claims, another meeting on the claim would be held on October 13.

On October 6, Mercury's counsel telephoned the Hospital's counsel to inquire whether the Hospital's expert had completed his review of the claims and thus would be prepared to meet as tentatively agreed on October 13. The Hospital's counsel advised Mercury's counsel that he would advise Mercury's counsel on October 7 if the meeting date would be satisfactory. On the afternoon of October 7, Hospital counsel advised Mercury's counsel by telephone that the Hospital intended to offer no money to settle Mercury's claim and was filing immediately in state court a complaint for a declaratory judgement "that it did not have to arbitrate and that it owed Mercury nothing (but that if it did owe Mercury money, the Architect in turn owed that money to the Hospital)." Mercury's counsel advised Mercury of this conversation and Mercury instructed its counsel to file an arbitration demand. Counsel mailed such demand on the morning of October 9, 1980.

The Hospital did file its action in the state court on the morning of October 8, 1980, naming as defendants Mercury and the Hospital's Architect. Service of the action was made on Mercury on October 9, 1980. In its complaint, the Hospital alleges essentially, so far as Mercury is concerned, that there is no "factual or legal basis" for Mercury's claim and that such claim is barred "by the

(Footnote 5 con't.) This statement has not been contradicted by the Hospital in its showing in this Court.

applicable statute of limitations." It also alleges that "Mercury has not demanded arbitration and has no right under the contract to have these claims or disputes submitted to arbitration," adding that Mercury has lost its right to arbitration by "failure to make timely demand for arbitration" and has "waived its right to arbitrate and is barred from submitting these claims to arbitration by laches and estoppel," all resulting "in substantial prejudice to Cone Hospital."

In its charges against the Architect as defendant in its state court action, the Hospital asserted various delinquencies in the performance of its duties, including premature acceptance of parts of the structure before such parts were properly usable and delays in making decisions and in "preparing and forwarding requests for proposals, revised drawings, instructions and other information to the contractor." With particular reference to the claim of Mercury, the Hospital charged in its complaint that the Architect had been negligent in connection therewith in not "requiring disposition of claims and disputes during the course of the work as required by the contract provisions," by procrastinating and failing "to rule on matters in dispute during the course of the work; by failing adequately to represent the interests of Cone Hospital; by not advising Cone Hospital promptly of the claims being asserted by Mercury; by breaching the fiduciary duty which Pease [the Architect] owed to Cone Hospital; and by other ways not specifically set forth hereinabove." Significantly, there is no charge of any conspiracy, or illegal combination on the part of Mercury and the Architect. By way of relief it sought judgment "that there is no right to arbitration, and that arbitration be stayed; ..., that there is no liability on the part of Cone Hospital to Mercury...;" and "that should it be determined that any amount [if there is any] as owed by Cone Hospital to Mercury, that it be determined and declared that Cone Hospital is entitled to be fully indemnified and reimbursed...." It demanded a jury trial on all issues.

After filing its complaint, the Hospital secured on October 15, 1980, ex parte, without any notice to Mercury, an injunction from the state court barring Mercury "from taking any action or actions directed toward arbitration of disputes between The Moses H. Cone Memorial Hospital and Mercury Construction Corporation until the trial provided for by N.C.G.S. § 1-567.3 (b) has occurred, and until the Superior Court has issued its Order as contemplated by this statute; ...." Mercury objected to this stay and, by order dated

October 27, 1980, the stay was dissolved. In the meantime Mercury had filed this action, alleging diversity between the plaintiff and the defendant, and seeking relief by way of an order of arbitration and stay of judicial proceedings pending such arbitration pursuant to the terms of the United States Arbitration Act. Mercury, also, petitioned for the removal of the state action filed by the Hospital to the federal court. Following removal of that state action, the Hospital moved for the remand of its action to the state court and for a stay of the federal action begun by Mercury pending resolution of the state court action. The district court granted remand, finding that the action between Mercury and the Hospital "was not separate and independent from the claim or cause of action against Pease [the Architect]," and that there was accordingly not diversity between the parties. It, also, stayed the action before it "pending resolution of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp. and J.N. Pease Associates*, 80 CvS 6787, in the North Carolina General Court of Justice, Superior Court Division (Greensboro)." In reaching this decision, it said that the state action "involve[d] the identical issue of arbitrability of the claims of Mercury Construction Corp. against the Moses H. Cone Memorial Hospital which is involved in this action." In finding a stay appropriate in such a situation, the district court cited and relied on *E.C. Ernst, Inc. v. Potlatch Corp.*, 462 F. Supp. 694, 699-701 (S.D.N.Y. 1978).

Mercury has sought review of that decision of the district court to stay the federal action by both mandamus and by direct appeal under 28 U.S.C. §§ 1291 and 1292 (a). It seems agreed, however, that under the prevailing rule in this Circuit, Mercury was entitled to a direct appeal from the district court decision and we shall review the decision below as an appeal.[6]

The real issue in this case, determinative of this appeal, is the right of the plaintiff to an order of arbitration by the district court of its dispute with the Hospital pursuant to the Federal Arbitration Act, and whether that right, if it exists, may be frustrated by the "reactive" filing of a state declaratory action by the Hospital

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[6] In addition to our own case, *Amdur v. Lizars*, 372 F. 2d 103 (4th Cir. 1967), sustaining appealability, *see also to the same effect: Buffler v. Electronic Computer Programming Inst., Inc.*, 466 F. 2d 694, 696-99 (6th Cir. 1972); *Druker v. Sullivan*, 458 F. 2d 1272, 1274 n. 31 (1st Cir. 1972); *Power Replacements, Inc. v. Air Preheater Co.*, 426 F. 2d 980, 982-83 (9th Cir. 1970); and *Hilti, Inc. v. Oldach*, 392 F. 2d 368, 369 n. 1 (1st Cir. 1968).

asserting the non-arbitrability of the dispute before Mercury had any real opportunity to seek arbitration. The resolution of this issue involves primarily the construction and application of the Federal Act.

By its express language the Federal Act applies where there is "[a] written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract...." 9 U.S.C. § 2. The constitutional validity of such an Act is found in the incontestable federal control over interstate commerce. *Prima Paint v. Flood & Conklin*, 388 U.S. 395, 405 (1967). The determination whether the contract is one " 'evidencing a transaction invoking [interstate] commerce,' " is a question on which "federal rules of contract construction and interpretation govern." *Janmort Leas., Inc. v. Econo-Car Intern.*, 475 F. Supp. 1282, 1286 (E.D.N.Y. 1979). The Act, however, does not include language conferring independent federal jurisdiction over an action thereunder. In order for a plaintiff to assert rights under it in a federal forum, he must establish an independent jurisdictional basis, such as diversity. *Kallen v. Dist. 1199, Nat. U. of Hospital & Health*, 574 F. 2d 723, 725 n 6 (2d Cir. 1978); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F. 2d 402, 408 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801; *Paul Allison, Inc. v. Minikin Storage of Omaha*, 452 F. Supp. 573, 574 (D. Neb. 1978); *Warren Bros. Co. v. Community Bldg. of Atl., Inc.*, 386 F. Supp. 656, 663 (M.D.N.C. 1974); *Litton FCS, Inc. v. Pennsylvania Turnpike Commission*, 376 F. Supp. 579, 585 (with citation of all the authorities) (E.D. Pa. 1974), *aff'd.*, 511 F. 2d 1394. But if, assuming diversity of the parties, an action meets the jurisdictional requirements of the Act, that action is enforceable in the state courts as well as in federal courts but *in either event it is governed by the federal substantive law developed in connection with the federal Act and not by state law. E.C. Ernst, Inc. v. Manhattan Const. Co.*, 551 F. 2d 1026, 1040 (5th Cir. 1977) (any questions under the Act are matters of "federal law"); *Robert Lawrence Co. v. Devonshire Fabrics, Inc., supra*, 271 F. 2d at 406; *Pathman Const. Co. v. Knox County Hospital Ass'n.*, 326 N. E. 2d 844, 851 (Ct. App. Ind. 1975); *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 636, 239 S.E. 2d 647 (1977).[7]

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[7] In *Robert Lawrence*, the Court said (pp. 406-07):

> "We think it is reasonably clear that the Congress intended by the Arbitration Act to create a new body of federal substantive law affecting the validity and interpretation of arbitration

In determining these principles of "substantive federal law," which govern the application of the Federal Act, the courts have begun by looking first at the purposes of the Act itself. As declared in *Prima*, 388 U.S. at 403-04, the purpose of the Act was explicitly declared to be to provide an "arbitration procedure, when selected by the parties to a contract, [that would] be speedy and not be subject to delay and obstruction...." And the "federal substantive law" which has been developed to accomplish this purpose has been found in the specific language in the Act itself or has been deduced in judicial decisions from the purposes and language of the Act.

Section 4 of the Act, after establishing the specific issue to be resolved in an action under the Act, directs the court to order arbitration once it is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," and Section 3 requires a stay of all proceedings "until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."[8]

It is obvious from these statutes that in a case such as this, there are but two facts which a plaintiff seeking arbitration must establish: (1) The making of the agreement and (2) the breach of the agreement to arbitrate. This was recognized by the district court which decided this case. In *C.P. Robinson Const. Co. v. National Corp. for Hous. Part.*, 375 F. Supp. at 446, 451, the Court said:

> "The district court [in an action under the Arbitration Act] must hear the parties and on being satisfied that (1) the making of the agreement for arbitration is not in issue and (2) the failure to comply with the agreement is not in issue, the court must order the parties to proceed to arbitration in accordance with the terms of the

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agreements....This is a declaration of national law equally applicable in state or federal courts."

In *Episcopal Housing Corp.*, the Court added (pp. 649-50):

"The Federal Arbitration Act was enacted pursuant to the commerce clause, thereby superseding the South Carolina common law. The Federal Arbitration Act has been accorded supremacy over the common law of numerous states by the federal courts....

"Likewise, numerous states have held that the Federal Arbitration Act is enforceable in the state courts, regardless of their existing common law."

[8] *Prima*, 388 U.S. at 402.

agreement."[9]

Section 3, it is true, would deny the right to a stay of proceedings in favor of arbitration if it can be said that the applicant for the stay is "in default in proceeding with such arbitration." It is often likened to waiver or laches or estoppel, but these terms are used not in their traditional sense but are to be given a definition and application in line with the statutory purposes and preferences reflected in the Act. But "default" in this sense is not to be lightly inferred in view of the statutory favor for arbitration.[10] Thus, mere "delay in making an arbitration demand is not a default within the meaning of Section 3." *Halcon International, Inc. v. Monsanto Australia, Ltd.*, 446 F. 2d 156, 161 (7th Cir. 1971);[11] it is only when this delay results in actual prejudice that it may amount to "default" within the Act. *Batson Y. & F.M. Gr., Inc. v. Saurer-Allma, etc.*, 311 F. Supp. 68, 72 (D.S.C. 1970). These are two situations and only two situations in which such prejudice, under the federal decisions, may rise to the level of "default" *under the Act* and these situations are generally described under the general classification of "waiver." These two types of "waiver" are correctly identified in *N & D Fashions, Inc. v. DHJ Industries, Inc., supra,* 548 F. 2d at 728.

The first type of waiver identified in *N & D Fashions* and qualifying as a "default" occurs "when a party 'actively participates in a lawsuit or takes other action inconsistent with' the right to arbitration." *Id.* at 728. In *Chatham Shipping Co. v. Fertex Steamship Corp.*, 352 F. 2d 291, 293 (2d Cir. 1965), Judge Friendly stated that "the earliest point at which such preclusion [i.e., waiver as used in this sense] may be found [in an arbitration case] is when the other party files an answer on the merits." This does not mean, though, that the filing of such an answer will always amount to a

[9] The Court must, in resolving the issues established by these Sections, particularly "avoid reaching the merits of arbitrable issues." *Drivers, Chauffers, etc. v. Akers Motor Lines*, 582 F. 2d 1336, 1342 (4th Cir. 1978); *see also Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960).

[10] *Singer Company v. Tappan Company*, 403 F. Supp. 322, 332-34 (D.N.J. 1975), *aff'd.*, 544 F. 2d 513 (3d Cir. 1976).

[11] For an extreme example of this, *see Necchi Sewing Machine Sales Corp. v. Carl*, 260 F. Supp. 665, 667-68 (S.D.N.Y. 1966), in which the party seeking the stay had delayed to request arbitration for some 10 years after the contract default occurred and for 5 years after suit in the state court for breach of contract had been begun. *See also Hilti, Inc. v. Oldach, supra*, 392 F. 2d at 369, involving 2 years' delay.

waiver. In *Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F. 2d 329, 330 (4th Cir. 1971), we said that "a default [within the Act] does not automatically result from a delay or from the filing of responsive pleadings." And it is clear that the removal of a state action is not to be deemed a "default" or "waiver" in this sense. *Garner Lumber Co. v. Randolph E. Valensi, Lange, Inc.*, 393 F. Supp. 161, 162 (W.D.N.C. 1974), *aff'd.*, 513 F. 2d 1171 (1975). It is only the "[s]ubstantially invoking the litigation machinery [which will qualif[y] as the kind of prejudice...that is the essence of waiver" in this context. *E.C. Ernst, Inc. v. Manhattan Const. Co.*, 559 F. 2d 268, 269 (5th Cir. 1977). And whether there is "default" or "waiver" in this sense is a question solely for the court itself to resolve.

The second type of "default" or "waiver" identified in *N & D Fashions supra*, "applies to bar arbitration when the process would be inequitable to one party because relevant evidence has been lost due to the delay of the other."[12] This type of "waiver" which may bar arbitration was earlier described in *Trafalgar Shipping Co. v. International Milling Co.*, 401 F. 2d 568, 571 (2d Cir. 1968) thus:

> "The purpose of laches is simply to relieve a decision-making body of the duty to resolve, and to prevent one party from having to prove, issues as to which the relevant evidence has been lost due to the delay of the other party. The only issues which the court is authorized to consider on a motion to compel arbitration are ones which pertain to 'the making of the arbitration agreement or the failure, neglect, or refusal to perform the same,' 9 U.S.C. § 4; Prima Paint Corp. v. Flood & Conklin, supra, 388 U.S. at 403-404, 87 S. Ct. 1801. If one of these issues is disputed before the court, and if one party claims that its ability to present proof in relation thereto has been prejudiced through the delay of the other, the court may consider whether it is fair to permit the dilatory party even to invoke its processes under the Act."[13]

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[12] 548 F. 2d at 728.

[13] The language of the Court on judicial review must be taken as limited to the issues which are otherwise properly before the Court, *i.e.*, the issues of whether, first, there is a contract to arbitrate, and second, a refusal to arbitrate, *see N & D Fashions, supra*, 548 F. 2d at 728 n 9, but does not apply to other types of claims or "laches."

But "waiver" or "estoppel" in this sense as constituting "default" under the Act presents a question to be resolved by the arbitrator and not by the court. *Halcon International, Inc. v. Monsanto Australia Ltd., supra,* 446 F. 2d at 160-163 ("...laches is to be determined by the arbitrators"); *N & D Fashions, supra,* 548 F. 2d at 728; *Janmort Leas., Inc. v. Econo-Car Intern., supra,* 475 F. Supp. at 1290. As the Court in *Trafalgar* stated (401 F. 2d at 572):

> "laches is not a technical legal issue which only a judge is competent to decide. Rather in the often esoteric field of commercial dealings, and in admiralty, it would seem that the severity of prejudice suffered through delay, and the reasonableness of excuses offered by the dilatory party, the elements of laches, might be resolved better where resort is had to the expertise of the arbitrators."

Apart from "laches," there are two other grounds which are occasionally asserted as barring arbitration but which the federal courts have consistently ruled, as a matter of "federal law," are not valid bars to arbitration. One of these grounds concerns the situation where a non-arbitrable claim is joined in the action with an arbitrable claim. The courts have uniformly held that the arbitrability of the arbitrable claim is not to be defeated or delayed because it is joined in the litigation with other issues not subject to arbitration. This principle is illustrated in *Janmort Leas., supra,* 475 F. Supp. at 1290, where the Court said:

> "That a controversy involves some claims which are not subject to arbitration will not preclude a court from directing arbitration of those claims which are."

Perhaps more analogous to the case under review here is *Acevedo Maldonado v. PPG Industries, Inc.,* 514 F. 2d 614, 616-17 (1st Cir. 1975). In this case the plaintiff sued the operator of a chlorine plant in negligence for injuries suffered from gas escaping from the chlorine plant. The operator of the plaint [sic] filed a third-party complaint against the designer of and contractor constructing the plant seeking "the right of contribution from a joint tort-feasor, proportionate to its negligence in designing and building the plant, for damages that might be awarded against third-party plaintiffs." The third-party defendants (i.e., the designer and builder) "moved for a stay...pending arbitration." The district court denied the motion and the third-party defendants appealed. The Court of Appeals reversed, ordering arbitration of the arbitrable issue. *See also to the same effect, Sam Reisfeld & Son Import Co. v. S.A. Eteco,*

530 F. 2d 679, 681 (5th Cir. 1976); *Buffler v. Electronic Computer Programming Inst., Inc., supra,* 466 F. 2d at 700; *Episcopal Housing Corp. v. Federal Ins. Co., supra,* 269 S.C. at 641, 239 S.E. 2d at 652.[14]

In other instances, the party objecting to arbitration has asserted that arbitration in federal court should be denied because of the pendency of a similar action in state court. These efforts, too, have been nullified by the courts. Federal courts will not "permit a party to a contract to circumvent an arbitration clause by commencing litigation in a state court." *Sumitomo Corp. v. Parakopi Compania Maritima,* 477 F. Supp. 737, 742 (S.D.N.Y. 1979); *Commonwealth Edison Co. v . Gulf Oil Corp.,* 400 F. Supp. 888, 890 (N.D. Ill. E.D. 1975), *aff'd.,* 541 F. 2d 1263 (1976); *Burger Chef Systems, Inc. v. Baldwin, Incorporated,* 365 F. Supp. 1229, 1233-34 (S.D.N.Y. 1973); *Network Cinema Corporation v. Glassburn,* 357 F. Supp. 169, 172 (S.D.N.Y 1973); *contra, E.C. Ernst, Inc. v. Potlatch Corp.,* 462 F. Supp. 694, 699-701 (S.D.N.Y 1978). In commenting on the cases from the Southern District of New York on this point, the Court in *Commonwealth Edison* said (400 F. Supp. at 890):

> "Those courts would not allow one party to circumvent an arbitration clause through the utilization of state court litigation and neither will I; to do so defeats the basic purposes of arbitration itself."[15]

Particularly may not the parties burden the arbitration process under the Federal Act "by adopting state law which shifts the

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[14] In the *Episcopal Housing Corp.* case, the Court said:

> "Under the Federal Arbitration Act, an agreement between two or more parties to submit their disputes to arbitration is not rendered unenforceable merely because there are additional parties to the disputes who are not bound by an arbitration agreement."

[15] This suit is almost identical on its facts with this case. In that case, the parties had a dispute over the right of Gulf (and others in interest with it) to terminate its nuclear supply contract with Edison. Edison wanted arbitration under the contract; Gulf denied that the dispute was arbitrable. Gulf filed in November, 1974, a suit in state court seeking a declaratory judgment that the dispute was not arbitrable. In January, 1975, Edison filed its federal action seeking arbitration. Gulf asked the federal court to "refrain from exercising its jurisdiction at least until the entire state court proceeding [which had been earlier filed] is complete." 400 F. Supp. at 889. And it was, in answer to that argument which is the same as that made by the Hospital here, that the Court in that case stated that it "would not allow one party to circumvent an arbitration clause through the utilization of state court litigation." 400 F. Supp. at 890. This was the opinion of the district court that was affirmed by the Court of Appeals in 541 F. 2d 1263.

determination of disputes from arbitrators to courts. To allow [that]...would undermine the provisions of the Federal Act."[16]

Measured by the above settled canons for the application of the Federal Arbitration Act, this case plainly qualified for relief under Section 4. Concededly, there was an independent basis for federal jurisdiction (*i.e.*, diversity). Under standards established by the very district court in which the action was filed, as well as by all other federal and state courts (with a single exception to be noted later) which have considered the issue, the relevant contract clearly involved interstate commerce. *C.P. Robinson Cons. Co. v. National Corp. for Hous. Part., supra*, 375 F. Supp. at 451; *Warren Bros. Co. v. Community Building, supra*, 386 F. Supp. at 664; *J.S. & H. Construction Co. v. Richmond County Hosp. Auth.*, 473 F. 2d 212, 214 n 6 (5th Cir. 1973). There is no question of the existence of a written contract which included a broad and comprehensive provision for arbitration of any dispute arising out of the performance of the contract. Nor can the Hospital contest the fact that it has refused to arbitrate the dispute with Mercury over a matter clearly within the arbitration clause of the contract. In these circumstances, the right of Mercury to a stay of proceedings and an order of arbitration under Section 4 is beyond dispute. And the district court, in a similar case, has, as we have seen, recognized this right. *C.P. Robinson Cons. Co. v. National Corp. for Hous. Part., supra*, 375 F. Supp. 446.

Actually as we understand its position, the Hospital does not contest the right normally of Mercury to an order to proceed with arbitration "in accordance with" the principle stated in *C.P. Robinson Construction*. Its basic contention is simply that because it has filed a state action for declaratory judgment that Mercury is not entitled to arbitration under the Federal Arbitration Act, the federal court is obligated to stand aside in favor of the state action. This position was adopted by the district court as the basis for its decision. Before reaching the propriety of that ruling, it is important to note the theories on which the Hospital predicates its state claim of non-arbitrability as set forth in its state complaint.

First, the Hospital asserts that the contract in this case does not involve interstate commerce and is thus not within the coverage of the Federal Arbitration Act. It has admittedly North Carolina authority to support this view. *Burke Cty. Pub. Sch. Bd. of Ed. v.*

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[16] *Commonwealth Edison Co. v. Gulf Oil Corp., supra* 541 F. 2d at 1269.

Shaver Partner., 265 S.E. 2d 481, 483, (N.C. App. 1980); *Bryant-Durham Elec. v. Durham County Hospital*, 256 S.E. 2d 529, 532, 42 N.C. App. 351 (1979). However, the district courts of North Carolina, as well as other courts, are to the contrary, and federal rules are controlling. *C.P. Robinson Const. Co. v. National Corp. for Hous. Part., supra.* 375 F. Supp. 446; *Warren Bros. Co. v. Community Building, supra*, 386 F. Supp. 656; *E.C. Ernst, Inc. v. Manhattan Const. Co., supra*, 551 F. 2d 1040, n 36 (hospital construction); *Pathman Const. Co. v. Knox County Hospital Ass'n., supra*, 326 N.E. 2d at 852-53.[17] Beyond this jurisdictional claim, the Hospital's basic argument is that its own Architect had been negligent in handling this dispute, giving rise to a cause of action in its favor against the Architect for any liability herein and that this controversy between the Hospital and the Architect is, like the controversy in *Sibley v. Tandy Corp.*, 547 F. 2d 286, 287 (5th Cir. 1977), "inextricably intertwined and incapable of severance" from the controversy between the Hospital and Mercury. However, as we have seen, the federal authorities are clear that this is not a ground for denial of arbitration of a dispute embraced within the arbitration clause of the contract. The addition of the Architect as a party defendant might prevent removal of the state action as the district court ruled (though, on this, we express no opinion) but it certainly could not frustrate Mercury's plain, indisputable right to an arbitration of its dispute with the Hospital. *See Sibley v. Tandy Corp., supra*, 547 F. 2d at 287, and other cases cited *supra* on this point. Moreover, any claim of untimeliness, waiver or laches (as distinguished from inconsistent legal action of which there is no claim in this case and which, under the rule stated in *N&D Fashions*, is for the court) is for the arbitrator and may not be an excuse for non-arbitrability. *See Halcon International, supra*, and *N & D Fashions, supra.* Actually, the Hospital's claim of waiver, as we have already pointed out, rests on what it asserts was the delinquencies or negligence of the Architect, whom it selected and designated in the contract as its agent to handle all disputes under the contract. To say the least, this is a novel theory for avoiding arbitration. However, the crucial point is that, in its state action, the Hospital does not set forth one fact that would, under controlling federal substantive law governing arbitration, defeat the right of Mercury to what the

[17] Incidentally, this case cites and relies on the decision of the district court in *C.P. Robinson, supra*, for its holding on the issue of interstate commerce.

Federal Arbitration Act was intended to assure it, *i.e.*, an "arbitration procedure... [that would] be speedy and not subject to delay and obstruction...." *Prima, supra,* 388 U.S. at 403-04.

As we have said, the Hospital's objection to the exercise of jurisdiction in this case to afford Mercury its clear right to arbitrate was that there is a state court proceeding involving the same issues and that, in the interest of judicial economy and convenience, the federal court should stay its hand and defer to the state court, since the state court is as able as the federal court "to determine whether federal law with regard to arbitration applies in the instant situation."[18] For this position the Hospital places its principal reliance on *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655 (1978). We think the reliance misplaced.

In *Will v. Calvert,* the plurality opinion was written by Justice Rehnquist, who emphasized that the Court was dealing with the appeal as one in mandamus and not on direct appeal and that the right to relief in mandamus required a clearer showing than a showing on direct appeal. Under established rules, Justice Rehnquist declared that mandamus could issue only if the party seeking it had a "clear and indisputable right" to have its claims adjudicated in a federal forum, and the right to such relief was one within the court's discretion. He extended the holding in *Brillhart v. Excess Ins. Co.,* 316 U.S. 491 (1942), which would deny deference to a concurrent state proceeding if the issue was one "of substantive federal law," to cover deference in favor of concurrent state proceedings which involved federal law and he dismissed *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976) with its dictum that reminded federal courts of their "unflagging obligation" to exercise their jurisdiction because there had been no final decision in that case. He concluded by finding that since the issuance of a writ of mandamus is discretionary "it cannot be said that a litigant's right to a particular result [in the exercise of that discretion] is 'clear and indisputable.' "[19]

The critical opinion in this case, however, was that of Justice Blackmun. He was the "swing-man" between Justice Rehnquist's

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[18] This language appears in the Hospital's response to Mercury's motion for an order staying state court proceedings filed January 26, 1981. What is interstate commerce is, however, a federal question where federal law must prevail. *See Janmort Leasing, supra,* 475 F. Supp. at 1286.

[19] 437 U.S. at 666.

opinion and that of Justice Brennan. Justice Blackmun voted with Justice Rehnquist only to the extent of vacating the writ of mandamus but, unlike Justice Rehnquist, he did so soley in order to permit Judge Will to reconsider his order in the light of *Colorado River*. He questioned the plurality opinion's treatment of *Brillhart* and of *Colorado River*, as authorizing the board discretion of the district court to defer found by the plurality, for whom Justice Rehnquist spoke. In essence, he agreed largely with the result reached by Justice Brennan in his dissenting opinion except that he would have left the decision to Judge Will to determine whether there were such "exceptional circumstances" as would, under *Colorado River*, permit the district court to depart from its "unflagging obligation" to exercise its jurisdiction. Accordingly, the real decision in *Will* was that a federal court being seized of jurisdiction of a case, was not to stay its proceedings in deference to a state action involving the same issues unless there were "exceptional circumstances" justifying such stay, and *Will* was remanded in order that the district court could consider whether there were such "exceptional circumstances." And that is exactly the construction given the decision on remand to the Court of Appeals and to Judge Will.

Thus, in *Calvert Fire Ins. Co. v. Will*, 586 F. 2d 12 (7th Cir. 1978), the Court of Appeals, on remand, summarized its construction of the several opinions of the Supreme Court in *Will* thus (586 F. 2d 14):

> "Justice Blackmun's view is that, in the context of a petition for a writ of mandamus, we should have merely required the district court to reconsider its action in light of *Colorado River* rather than ourselves determining whether *Colorado River* compelled the district court to immediately adjudicate Calvert's federal claims.
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> "Since the four Justices who joined Justice Brennan's opinion believed that under *Colorado River* the district court now has a clear obligation to immediately adjudicate Calvert's federal claims, it follows logically that these four Justices would favor going at least as far as Justice Blackmun and require the district court to determine whether its earlier deferral to concurrent state proceedings is now correct. Calvert is therefore arguably entitled to an order requiring the district court

to reconsider its actions in this case in light of *Colorado River*.

"The district court, however, in its statement filed with this court on remand, has indicated that it intends to follow such a course on its own motion. There is therefore no need for this court to take any further action."

In *Calvert Fire Insurance Co. v. American Mut. Reins. Co.*, 459 F. Supp. 859 (N.D.Ill. E.D. 1978), which was the decision of Judge Will on remand, Judge Will construed the decisions in *Will* exactly as had the Court of Appeals in 586 F. 2d at 14, and he proceeded to apply the rule that limited deference to a concurrent state action to situations presenting very "exceptional circumstances." He found that there were "exceptional circumstances" in the case under review justifying the stay. In reaching that conclusion he said that the state action, involving a matter *controlled by state law*, was filed six months before the federal action and he found that, later when filed the federal action was no more than a "reactive defensive maneuver," simply "a tactical maneuver to delay the determination of whether or not Calvert owes the pool its share of the 1974 losses," and a mere "tactical defensive action in which the only exclusive federal claim is a contrived one."[20] It was on that basis and on that basis alone that Judge Will determined to stay the federal action.

It is manifest that Mercury's action was not a "contrived" federal claim asserted only in order to delay the resolution of the controversy nor was it a "reactive" or "tactical maneuver" for such purpose. The charge of a "contrived" action is more appropriately applied to the Hospital's state action. After negotiating for months both through its Architect and later its attorneys with respect to the claim and, though giving the clear impression that it earnestly desired to settle amicably the controversy without arbitration, the Hospital suddenly, without any forewarning, advised Mercury on October 8 that it was filing immediately a suit in the state court in order to enjoin arbitration. It is only fair to assume that this was to take advantage of the decisions of the North Carolina Court of Appeals which would deny interstate commerce character to the contract in question. It joined as a co-defendant its own agent, the

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[20] 459 F. Supp. 862-63.

Architect, and again it seems fair to assume that this was to avoid removal of the action to the federal court. But, even assuming there is some controversy between the Hospital and the Architect, to which Mercury is not a party, why should Mercury be delayed in its right to a prompt resolution by arbitration, without the expense of long and protracted litigation, as the parties had solemnly agreed, because of some controversy between the Hospital and its Architect? Such a maneuver plainly prejudiced Mercury in its right to arbitration under the Federal Act. This is the very kind of prejudice noted in *E.C. Ernst, Inc. v. Manhattan Const. Co., supra,* 559 F. 2d at 269, where the objection to arbitration was the reverse of that here but where the principle was the same:

> "When one party reveals a disinclination to resort to arbitration or any phase of suit involving all parties, those parties are prejudiced by being forced to bear the expenses of a trial, which in this case is quite lengthy. Arbitration is designed to avoid this very expense."

There are no "exceptional circumstances" justifying the action of the district court in deferring in favor of the state court and certainly the district court stated none. Nor could it do so, on the basis of the conceded record here. [21] The only apparent reason for the Hospital's precipitate resort to its state action was an attempt to foreclose any resort by Mercury to arbitration in the federal court under federal law, and to litigate the right to arbitrate under state law, all on the premise that the contract in question did not involve "interstate commerce." This view of the nature of the contract has been declared by the Court of Appeals of North Carolina in two recent cases.[22] In these cases the Court of Appeals of North Carolina held that under facts similar to those here the pertinent construction contract was not "in interstate commerce." If this construction of the contract of the parties in this case were adopted, the rights of the parties would not be governed by the Federal Arbitration Act, but by state law, which is the Hospital's basic position. Such a construction of the contract is, as we have seen,

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[21] This it would seem is a complete answer to the faulty assessment of *Will* as made by the court in *E.C. Ernst, Inc. v. Potlatch Corp., supra,* 462 F. Supp. 694, on which the district court rested its decision.

[22] *Burke Cty. Pub. Sch. Bd. of Ed. v. Shaver Partner., supra,* 265 S.E. 2d at 483; *Blount-Durham Electric Co. v. Durham County Hospital Corp., supra,* 256 S.E. 2d at 532.

contrary to all relevant federal decisions, including decisions of the very court which stayed the federal proceedings in this case.

The Hospital seeks to answer this argument by arguing that, if the contract is held to be in interstate commerce, the North Carolina arbitration statute would apply and it is similar to the Federal Act. Thus, whether in the state court or in the federal court, the proceedings, according to the Hospital, would be the same. North Carolina it is true has adopted the Uniform Arbitration Act, Article 45A § 1-567.1, *et seq.* G.S.N.C., which has considerable similarity to the Federal Act. However, that Act and its provisions have not been given judicial construction by the North Carolina courts as has the Federal Act by the federal courts and the rights of the parties thereunder have not thus been clearly delineated. Until a statute has been given an authoritative judicial construction by the enacting state's own courts, its application and reach are uncertain. Specifically, we do know what the rights of the parties are on any claim of untimeliness, laches or waiver under the Federal Act. We do not know whether the North Carolina courts will treat these issues as issues for the arbitrators, or as issues to be the subject of long jury trials. The Hospital assumes apparently that the North Carolina courts would treat them as issues for jury determination in a judicial proceeding and not for the arbitrators for it attaches to its state complaint a demand for a jury trial, a right it would not have in federal court, where all these issues would be committed to the determination of the arbitrators. Moreover, if these issues are triable to the court rather than by the arbitrators, Mercury will be denied the right to a "speedy [remedy] not subject to delay and obstruction" by the delays inherent in a jury trial. This was the right the Federal Act was particularly intended to assure. In addition, federal procedure under the Act, as established in the decisions, would not permit the Hospital, by the addition of the Architect as a codefendant, to frustrate and defeat arbitration; the federal court would simply sever the arbitrable claim and order the parties to proceed to arbitration of that claim. All these rights are rights guaranteed Mercury by the Federal Arbitration Act, which governs if the contract which provides the basis for the claim is "in commerce."

This is a case where it can be fairly said to be doubtful whether the rights of Mercury as fixed by "federal substantive law" will be recognized in the state court. Certainly, if the North Carolina court

adheres to its view that contracts such as the one here are not "in commerce," or construes the terms of the Uniform Arbitration Act with the severe rigidity it has in arbitration cases prior to the State's adoption of the Uniform Arbitration Act, Mercury will not be accorded the benefit of the "substantive federal law" developed in the federal court for the application of the Federal Arbitration Act. The loss of its rights as established by federal "substantive law" in arbitration demands that the district court not defer here. Even the plurality opinion in *Will* would not suggest deference where it was not clear that the state courts would apply controlling federal law as mandated under the Supremacy Clause. We do not think the mere fact that North Carolina has recently enacted the Uniform Arbitration Act constitutes such an "exceptional circumstance" as would preclude Mercury's right to a federal forum for the exercise of a federal right.

It should be added that refusal by the district court to defer to the state action could not prejudice either party. There has been no action taken in the state action. It is in exactly the same posture as the federal action. The real point of difference is that the federal courts have a body of precedent governing the actions; the North Carolina courts have none. Both actions are controlled by federal, not state, law. If expedition of the resolution is the desideratum, then plainly every consideration favors federal jurisdiction over state jurisdiction, particularly since federal law is controlling.

Unlike Judge Will in *Calvert*, the district court found no "exceptional circumstances" justifying a departure from the *Colorado River* rule of "unflagging obligation" of the federal court to maintain federal jurisdiction, despite the pendency in state court of a similar action between the parties. Without such finding of "exceptional circumstances," the district court had no right to stay the federal proceedings in this case. This is the teaching of *Will v. Calvert* as construed by Judge Will and by the Seventh Circuit. That right is not to be defeated by "forum-shopping," which operates, whether intentional or not, to defeat Mercury's plain federal right to arbitration and to deny it a right to a federal forum for the redress of a federal right by a far-fetched claim in a cause of action in the state court by the Hospital against its own agent for alleged delinquencies for which Mercury had no responsibility.

Accordingly, the judgment of the district court is reversed and the cause is remanded to the district court with directions to

proceed in conformity herewith.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent for the reasons sufficiently stated by Judge Hall, and I would add a word in joining his opinion.

As Judge Hall has pointed out for State court decisions, the only federal courts of appeal to consider the question have uniformly decided that cases under the Federal Arbitration Act must be decided by State courts when called upon. *Commercial Metals Co. v. Balfour, Guthrie & Co., Ltd.*, 577 F2d 264 (5th Cir. 1978); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F2d 402 (2d Cir. 1959), cert. dismissed, 364 U.S. 801.

As the opinion of the majority does not emphasize, this is not, and may not be, a case of federal question jurisdiction. We have so held only recently in *Sine, et al v. Local No. 992, etc.*, 644 F2d 997 (1981), and the statute specifically so provides, 9 U.S.C. § 4. Thus, the case before us must be based on diversity jurisdiction, as it is.

In each diversity case where one party prefers a federal forum and the other a State forum, there is apt to be a race to the courthouse. There is nothing iniquitous about it, and to hold as the majority does that preferring a State forum somehow offends does not give effect, I think, either to Article VI of the Constitution or of the latest statement of the Supreme Court on that subject. Article VI, in pertinent part, provides:

> "The Senators and Representatives before mentioned, and the Members of the State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; ...."

As it has said before, in *Sumner v. Mata*, 49 L.W. 4133, 4136 (1981), the Court stated:

> "State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinion as to how that document should be interpreted that all are not doing their mortal best to discharge their oath of office."

That statement applies, of course, to the construction of federal statutes.

The mere fact that one of the parties here does not desire

arbitration, while the other does, does not mean that the party who desires arbitration is necessarily right and the party who opposes it is necessarily wrong. It is simply that, as in every law suit, there is a difference of opinion.

Indeed, if there is any forum shopping in this case and if such is somehow or another iniquitous, which I doubt, it is equally on the part of the federal plaintiff. The federal plaintiff (Mercury) was a State court defendant. Even assuming that the North Carolina Supreme Court would find that the contract involved here was not in interstate commerce, and thus the Federal Arbitration Act would not apply becuase of the two intermediate court decisions,[1] there is no reason given nor is any speculation possible that the North Carolina courts would not have enforced the North Carolina Arbitration Act had the federal plaintiff (Mercury) only requested it in that proceeding.[2] Thus, the federal plaintiff would have already achieved the arbitration it now so zealously asks us to impose on the other party. Because it did not take the simple and direct route of previously getting the arbitration that it now says it wants, the only logical conclusion is that it wished a federal forum to decide the question of whether or not to arbitrate as well as to review the decision of the arbitrators.

In line with these thoughts, I note that the owner, the contractor, and the architect, each of whom blames the others for the difficulties at hand, were all parties in the State court proceeding and thus complete relief could have been given. All are not parties to the federal proceeding and thus complete relief may not be given.

When I add these reasons to those given by Judge Hall, I am more firmly of opinion that the district court did not abuse its discretion in awaiting action on the part of the State court, which is all that it

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1. Since *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967), intermediate State court decisions are not binding, but should receive proper regard. Wright on *Federal Courts*, 2nd Ed., § 58.

2. The North Carolina statute § 1-567.3 (a) provides that "On application of *a party* showing an agreement...[to arbitrate] the court *shall* order the parties to proceed with arbitration...." And subsection (c) of the same code section provides that, for pending litigation, the application *"shall be made"* in the pending case. (Italics added)

To emphasize that there is no difference here except as to forum, even the arbitrator, State and federal, would be chosen from the panel, for the contract provides for appointment by the American Arbitration Association. 9 U.S. C. § 5; N.C.G.S. § 1-567.4; Construction Industry Arbitration Rules, American Arbitration Association, 1981, §§ 5-13 incl.

did. The action of the district court is nothing more nor less than the exercising of control of its own docket, in which matter it should be allowed rather wide latitude instead of being strictly circumscribed as the majority would have it.

I am authorized to say that Judge Hall joins in this opinion.

HALL, Circuit Judge, dissenting:

I am at a loss to understand how the majority could have strayed so far afield in its resolution of this case. We have been called upon to determine whether the district court properly exercised its discretion by deferring to the state court. Rather than addressing this question, the majority concentrates on tangential matters which are not ripe for adjudication and which serve only to divert attention from the true controversy.[1]

This controversy is a product of the parallel legal proceedings instituted by the parties. Initially, the Hospital filed a declaratory judgment action in state court seeking a declaration of its rights and liabilities under the construction contract. The Hospital alleged, among other things, that Mercury was not entitled to invoke the arbitration clause of the contract because it had waived arbitration, and was otherwise prohibited by laches and estoppel. In response, Mercury asserted its right to arbitration.

Although North Carolina provides by statute a means for compelling arbitration,[2] Mercury nevertheless filed in federal court a petition to compel arbitration pursuant to the Federal Arbitration Act and a petition to remove the state action to federal court. The district court judge denied removal and declined to rule on the petition to compel because the identical issues were already before the state court. Mercury now asks us to decide whether the district court properly stayed its consideration of the petition to compel arbitration pending the outcome of the parallel state proceeding.

When analyzing this question, we must remember the nature of the case and its procedural posture. The identical issues of arbitration and waiver have been presented to both a state and

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[1] The majority opinion, which in effect directs arbitration, will come as a surprise to all parties. No one argued that this court should decide that issue. The bone of contention concerned which trial court should decide, in accordance with the plain provisions of the statutes, whether arbitration should be compelled.

[2] N.C. Gen. Stat. § 1-567.1, *et seq.*

federal court. The parties to the arbitration agreement are before both courts, and each court has statutory authority to compel arbitration.[3] Therefore, both courts are capable of providing the appropriate relief to the parties. Further, both lawsuits are still in the pleading stage, so neither party has had an opportunity to present its arguments for or against arbitration. Thus, the next step in these proceedngs is for a trial court to hear the parties and determine whether the issues are arbitrable. Against this background, we must decide whether the district court is obligated to make that determination.

The Federal Arbitration Act does not specify the obligations of the district judge when confronted with a parallel state proceeding. Of the various provisions of the Act, Section 4 comes the closest to

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[3]/ The clear majority of decisions has held that a state court is obliged to apply the Federal Arbitration Act to arbitration disputes involving interstate commerce. *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal. App. 3d 19, 136 Cal. Rptr. 378 (Ct. App. 1977); *West Point-Pepperell, Inc. v. Multi-Line Industries, Inc.*, 231 Ga. 329, 201 S.E. 2d 452 (1973); *Pathman Const. Co. v. Knox County Hospital Ass'n*, 164 Ind. App. 121, 326 N.E. 2d 844 (1975); *Fite & Warmath Const. Co. v. MYS Corp.*, 559 S.W. 2d 729 (Ky. 1977); *In re A/S J. Ludwig Mowinckels Rederi*, 25 N.Y. 2d 576, 307 N.Y.S. 2d 660, 255 N.E. 2d 774, *cert. den.* 398 U.S. 939 (1970); *Episcopal Housing Corp. v. Federal Insurance Co.*, 269 S.C. 631, 239 S.E. 2d 647 (1977); *Miller v. Puritan Fashions Corp.*, 516 S.W. 2d 234 (Tex. Civ. App. 1974); *Port of Seattle v. Washington Utilities & Transportation Comm.*, 92 Wash. 2d 325, 597 P. 2d 383 (1979) (en banc). Cases reaching a contrary conclusion include *Pullman, Inc. v. Phoenix Steel Corp.*, 304 A. 2d 334 (Del. 1973); *Standard Co. of New Orleans v. Elliot Const. Co.*, 363 So. 2d 671 (La. 1978); and *Wilson & Co. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 43 N.W. 2d 657 (1950), *cert. den.* 342 U.S. 812 (1951).

The position of North Carolina is unclear. In the two decisions cited by the majority, the North Carolina Court of Appeals ruled that the Federal Arbitration Act did not apply to the contracts in question because those contracts did not involve interstate commerce. *Burke County Public Schools Bd. of Ed. v. The Shaver Partnership*, 265 S.E. 2d 481 (N.C. App. 1980); *Bryant-Durham Electric Co. v. Durham County Hospital Corp.*, 42 N.C. App. 351, 256 S.E. 2d 529 (1979).

However, we need not address the issue here. North Carolina has adopted the Uniform Arbitration Act, N.C. Gen. Stat. § 1-567.1, *et seq.* The Uniform Act requires the state court to compel arbitration in virtually the identical manner and circumstances set forth in the Federal Act. *See* note 3, *infra*. Therefore, the same result should be obtained regardless of the law applied.

The North Carolina act provides, in pertinent part:

§ 1-567.2. *Arbitration agreements made valid, irrevocable and*

governing this situation.[4] That section requires the court to consider a petition to compel and then to either order arbitration or, if necessary, to entertain certain specified challenges to the agreement. The clear Congressional purpose behind these directives is to expedite the arbitration process by requiring prompt

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enforceable; scope. --(a) Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid; enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

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§ 1-567.3. *Proceedings to compel or stay arbitration.* -- (a) On application of a party showing an agreement described in G.S. 1-567.2, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

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(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subsection (a) of this section, the application shall be made therein. Otherwise the application may be made in any court of competent jurisdiction.

• • • •

[4]/ 9 U.S.C. § 4 provides:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in

action by the court. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

In this case, however, the purpose of Section 4 will be competently and authoritatively implemented by the state court. It would serve no purpose to read into Section 4 the requirement that the federal court must also rule upon the petition, thereby duplicating the efforts of the state court and possibly contradicting its result. Under such circumstances, Section 4 does not require the federal court to rule upon the petition.

We next turn to the Supreme Court's landmark decision in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), in which the Court developed several principles and standards for gauging the propriety of a federal court's deferral to a state court. The Court stated that, as a general rule, "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction...." *Id.* at 817, *quoting McClellan v. Carland*, 217 U.S. 268, 282 (1910). The Court further observed that the federal district courts have a "virtually unflagging obligation" to exercise the jurisdiction given them. 424 U.S. at 817. However, the Court also recognized the importance of wise judicial administration, conservation of judicial resources and the comprehensive disposition of litigation, and found that exceptional circumstances would justify deferral by the federal court. Those circumstances include: (1) the prior assumption of jurisdiction over the *res* by state court; (2) the inconvenience of the federal forum; (3) the desirability of avoiding

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which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specifically call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

piecemeal litigation; and (4) the order in which jurisdiction was obtained by the concurrent forums. *Id.* at 818.

Such exceptional circumstances are present here.[5] As discussed earlier, the waiver issue was first presented to the state court, which has the authority and competence to provide appropriate relief. A stay of the federal action gives proper deference to the prior jurisdiction of the state court and eliminates the possibility of duplicative effort and conflicting results. Further, the state court, having jurisdiction over both the arbitration issue and the substantive action on the merits, in a better position to bring the entire litigation to a prompt conclusion.

Despite these strong considerations, the majority concludes that the federal court must rule upon Mercury's petition because "federal substantive law" gives Mercury the right to arbitrate the Hospital's waiver defenses. The majority overlooks the fact that we do not know the basis for these defenses because this case is still in the pleading stage, and therefore we cannot know whether the defenses are of an arbitrable nature. Nevertheless, the majority jumps to the conclusion that arbitration would immediately ensue, and in the process forgets that we are supposed to be deciding which court will make that very determination. In other words, with a near total ignorance of the surrounding circumstances, the majority has ruled upon Mercury's petition to compel arbitration and has used that ruling to admonish the district court for not acting in the first place.

I suspect the majority's primary fear is that the Hospital has attempted to deprive Mercury of its access to a federal forum. The majority refers ominously to the filing of the state action as intended "to defeat arbitration," and labels the joinder of the architect-agent as a ploy to avoid diversity. These inferences ultimately compel the majority to accuse the Hospital of filing "a

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[5]/ The factors regarding the state court's previous assumption of jurisdiction over the *res* and the inconvenience of the federal forum are not present. Though these factors are important in their own right, we do not view their absence as dispositive. As the Supreme Court stated in *Colorado River:*

> "No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required."

424 U.S. at 818-19.

contrived action" and forum-shopping.

The more reasonable explanation for these acts is that after months of negotiations, and having discovered the possible misfeasance of its architect, the Hospital decided it had better litigate its cause. The Hospital did so in state court so that it could bring all the parties before one forum. The treacherous motives attributed to these acts is more likely a conjecture stemming from the majority's hindsight than the reasoned product of the Hospital's foresight.

In the final analysis, the majority has combined a form of bootstrap logic with misconceptions of bad faith to reach a conclusion which is supported neither by law nor fact. For these reasons, I dissent.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-1009

In Re:
Mercury Construction Corporation, *Petitioner*

No. 81-1042

Mercury Construction Corporation, *Appellant,*

- versus -

The Moses H. Cone Memorial Hospital, *Appelle.*

Argued: June 1, 1981 Decided: November 24, 1981

ORDER

Upon consideration of the petition for rehearing, and with the concurrence of the active Circuit Judges, except Judge Widener and Judge Hall, who dissent from the denial of the petition,

IT IS ORDERED, That the petition for rehearing be, and it is hereby denied.

/S/Donald Russell
United States Circuit Judge

WIDENER, Circuit Judge, dissenting:

I respectfully dissent to the denial of rehearing in this case.

As I have previously pointed out in dissent, the basic theme of the majority opinion is its lack of confidence in the North Carolina courts to enforce the Federal Arbitration Act. At the time the case was decided and the majority opinion was filed, I thought that lack of confidence was without foundation, and so expressed myself.

Unknown to us at the time the case was decided, but following argument, the Supreme Court of North Carolina had decided the case of *Burke County Public Schools, etc. v. Shaver, etc.*, _____ N.C. _____, 279 S.E. 2d 816 (July 8, 1981). *Burke* was a case on facts

indistinguishable from those now before us and is one of the very cases[1] relied on by the majority to illustrate why the North Carolina courts would not try this case under federal substantive law (the Federal Arbitration Act).

The gist of the majority decision here as shown by the opinion itself is a follows:

> "This is a case where it can be fairly said to be doubtful whether the rights of Mercury as fixed by 'federal substantive law' will be recognized in the state court." Slip op. p. 34.

Contrast that statement of North Carolina law as expressed in the majority opinion with North Carolina law as expressed by the North Carolina Supreme Court in *Burke:*

> "This appeal presents two questions. First, whether the contract between plaintiff and defendant is 'a contract evidencing a transaction involving commerce' within the meaning of § 2 of the Federal Arbitration Act. [Footnote omitted] We conclude that it is. Second, whether the Federal Arbitration Act must be applied in state courts. We hold, for reaons given, that it must." 279 S.E. 2d at p. 817.

Not only was the holding of the North Carolina Supreme Court that which I have just quoted, the opinion goes on in detail to provide as follows:

> "...Parties in a state court to a contract evidencing an interstate transaction should not be permitted to avoid arbitration when, had the action been brought in federal court, they would have been compelled to arbitrate. This much flows from the denomination of compulsory arbitration as a matter of substantive, rather than procedural, law." 279 S.E. 2d at 824-825, note 16.

Additionally, the court in *Burke* not only held, p. 824, that the contract in question "must be submitted to arbitration pursuant to the federal act," as one of the reasons therefor it gave that the application of the federal substantive law "discourages 'forum shopping.' " *Burke,* p. 824.

Thus, the recent decision of the North Carolina Supreme Court, coming as it did after argument in this case but before decision,

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[1] The majority opinion relied on the decision in the North Carolina intermediate court of appeals which was reversed by the decision referred to in this paragraph.

although unbeknownst to us at that time, but known to us prior to the time this order is entered denying rehearing, should have disabused this court of any notions it may have had that the North Carolina courts would not follow the federal substantive law. To deny rehearing in this case, even without mention of the reversal of one of the cases on which it principally depends, I find inexplicable.

The upshot of this case is that our court is treating a cause of action concerning the Federal Arbitration Act in many respects as general federal question litigation, which it is not, rather than as diversity litigation, which it is.

I am authorized to state that Judge Hall joins in this dissent.

RUSSELL, Circuit Judge:

The dissent to the denial of rehearing of the *en banc* opinion herein misconceives the real reason on which that opinion rests and, unfortunately, would find the rationale for such opinion to be a "lack of confidence in the North Carolina courts to enforce the Federal Arbitration Act." The apparent basis for this conclusion is the discussion in the opinion of an issue which, though of importance, was not the decisive point. This issue related to whether the contract in this case was in interstate commerce. At the time the majority opinion was distributed the only decisions from a North Carolina appellate court on this question were the two decisions of the Court of Appeals of North Carolina cited in the majority opinion.[1] These decisions held that a contract such as that involved here was not in interstate commerce. We noted that fact and did suggest that such a construction of the contract was plainly erroneous. Fortunately, the North Carolina Supreme Court, in a decision which reviewed the issue with painstaking care has corrected the error of the Court of Appeals.[2] But the dissent seems to assume by this decision of the North Carolina Supreme Court, the *ratio decidendi* of the majority opinion is completely undermined. This is in error, as a reading of the majority opinion will demonstrate.

The real issue in this case was: Under what circumstances is it appropriate for a federal court to stay its hand in favor of

[1] *Burke Cty. Pub. Sch. Bd. of Ed. v. Shaver Partner.*, 265 S.E. 2d 481 (N.C. App. 1980); *Bryant-Durham Elec. v. Durham County Hospital*, 256 S.E. 2d 529 (42 N.C. App. 351, 1979).

[2] *Burke County Public Schools, etc. v. Shaver, etc.*, 279 S.E. 2d 816 (July 8, 1981).

adjudication by a state court, where the point is the application of federal law. We concluded in the majority opinion "that," in the words of *Will*, "a federal court being seized of jurisdiction of a case, [is] not to stay its proceedings in deference to a state court action involving the same issues unless there [are] 'exceptional circumstances' justifying such stay . . ."[3] And, as Justice Blackmun pointed out in what was the prevailing opinion in *Will*,[4] this requirement of "exceptional circumstances" is particularly rigorous if the "case turns on federal issues," as it does here. That was the controlling rule accepted by the majority in this case. Applying it to the facts of this case, we concluded:

> "Unlike Judge Will in *Calvert*, the district court [in this case] found 'no exceptional circumstances' justifying a departure from the *Colorado River* rule of 'unflagging obligation' of the federal court to maintain federal jurisdiction, despite the pendency in state court of a similar action between the parties. Without such finding of 'exceptional circumstances,' the district court had no right to stay the federal proceedings in this case."

Such was the heart of our decision; such was the basis upon which it was decided. There was in this reasoning no expression of a "lack of confidence in North Carolina courts" faithfully to discharge their duty and we deplore any suggestion to that effect, especially because of the mutual respect that has always marked our relations with the North Carolina courts. It was, on the contrary, merely an application of what we conceived to be the prevailing opinion in *Will*.

[3] Slip opinion p. 28.

[4] *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 667-68 (1978).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

THE MOSES H. CONE MEMORIAL HOSPITAL,
Plaintiff

v.

C-80-585-G

MERCURY CONSTRUCTION CORPORATION and J.N. PEASE ASSOCIATES,
Defendants

Date of Entry: December 24, 1980

MEMORANDUM OPINION

WARD, District Judge

This matter came before the Court for a hearing on December 22, 1980, on plaintiff's motion to remand for lack of diversity jurisdiction and defendant Mercury's motion to dismiss or, in the alternative, to stay pending arbitration. For the reasons which follow, the Court has decided to remand this action and, consequently, will not reach defendant Mercury's motion.

The plaintiff, Moses H. Cone Memorial Hospital (the Hospital), and the defendant, J.N. Pease Associates (Pease), are incorporated and have their principal place of business in North Carolina. The defendant, Mercury Construction Corp. (Mercury), is incorporated in Delaware and has its principal place of business in Alabama. The Hospital contracted with Pease, on February 27, 1969, for Pease to provide architectural and engineering services in connection with additions and alterations at the Hospital. Complaint Exhibit 1 (October 27, 1980). Their agreement required Pease to, *inter alia*, plan and design the entire project, formulate construction bids and contract forms, assist in awarding contracts, decide claims between the owner and contractor, inspect the work, certify the work's quality to the Hospital, prepare change orders, and determine the dates of final and substantial completion. Complaint Exhibit 1, Article 3. It provided, however, that Pease "will not be responsible

for the Contractor's failure to carry out the construction work in accordance with the Contract Documents." Complaint Exhibit 1, Article 3.4.3.

On July 15, 1975, the Hospital contracted with Mercury to perform the construction work required for the additions and alterations. Complaint Exhibits 2 & 3. The Hospital alleges that, during the course of the project, various extensions of the completion deadlines were granted through change orders. After completion of the project, Mercury presented to Pease claims against the Hospital for causing delays, inefficiencies and other problems. Complaint Exhibits 4 & 5. The Hospital alleges it learned of these claims in April 1980 when Pease furnished the Hospital with various information, including a narrative statement of Mercury's claims. Complaint Exhibit 6. The Hospital believed these claims were baseless.

Therefore, it filed this suit for a declaratory judgment in North Carolina state court against Mercury and Pease. N.C. Gen. Stat. § 1-253 *et seq.* (1969). It first alleged that it did not breach the construction contract by causing illegal delays, that it was not responsible for the delays, and that Mercury could have arbitrated any claims under their contract during the progress of the work but passed up that right by failing to do so then. It further alleged that, instead, Mercury breached their contract and caused delays and other problems:

> by failing and refusing to schedule and coordinate the progress of the work with the owner so as to cause an absolute minimum of interference with or interruption to the normal activities within the existing hospital; by failing to schedule and coordinate the work so that areas could be completed within the shortest practical period of time and then be released to the owner for its use; by refusing to quote proposals; by delay in quoting proposals; by delay in furnishing information to Pease and Cone Hospital; by poor workmanship; by inadequate planning and supervision; by delay in completing work; by failing and refusing to cooperate with the owner; by failure to anticipate and provide for problems and changes; by arbitrary changes in sequence of work; by failure to keep the premises free from accumulation of waste materials and rubbish; by failing to have claims

> and disputes resolved during the progress of the work as required by the contract; and by other ways not specifically set forth hereinabove.

Complaint ¶ 15.

The Hospital also alleged that Pease breached its contract with the Hospital:

> by not giving adequate and proper assistance in planning and developing the building program; by failure to foresee and provide for problems and changes; by preparing and providing plans and specifications containing errors and ommissions [sic]; by inadequate supervision and administration; by premature acceptance of areas before such areas were properly usable for hospital purposes; by delay in making decisions and by delay in implementing its own decisions and decisions of the owner and contractor; by delay in preparing and forwarding requests for proposals, revised drawings, instructions and other information to the contractor; by delay in forwarding proposals and other information to Cone Hospital; by not requiring disposition of claims and disputes during the course of the work as required by the contract provisions; by procrastination and by failing to rule on matters in dispute during the course of the work; by failing adequately to represent the interests of Cone Hospital; by not advising Cone Hospital promptly of the claims being asserted by Mercury; by breaching the fiduciary duty which Pease owed to Cone Hospital; and by other ways not specfically set forth hereinabove.

Complaint ¶ 16.

The Hospital requested a declaration that no right to arbitration existed, that it was not liable to Mercury, and that, if it was liable to Mercury then Pease should indemnify and reimburse it. Because complete diversity did not exist between the parties, Mercury, contending that the action involved a claim or cause of action against it separate and independent from the claim or cause of action against Pease, removed the action to this Court pursuant to 28 U.S.C. § 1441(c). Mercury's contention, however, is without merit. This action does not involve separate and independent claims or causes of action but, rather, involves a "single wrong...arising

from an interlocked series of transactions." *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 14, 71 S. Ct. 534, _____, 95 L. Ed. 702, 708 (1951); *Board of Governors v. Weber, Griffith & Mellican*, 426 F. Supp. 483 (S.D. Ill. 1977); *Board of County Commissioners v. Blount Brothers Corp.* 348 F. Supp. 177 (S.D. Fla. 1975); *Hyde v. Carder*, 310 F. Supp. 1340 (W.D. Ken. 1970).

The parties, providing great assistance to the Court, have exhaustively briefed this issue. However, it requires no further discussion except to point out that vast factual differences exist between this case and the cases of *Climax Chemical Co. v. C.F. Braun & Co.*, 370 F. 2d 616 (10th Cir. 1966), *cert. denied*, 386 U.S. 981 (1967); *Carl Heck Engineers, Inc. v. LaFourche Parish Police Jury*, 622 F. 2d 133 (5th Cir. 1980), and similar cases. This Court elects not to follow those cases here. Instead, it believes the rule in *Finn* requires remand. An Order of Remand will be entered accordingly.

Hiram H. Ward
United States District Judge

December 24th, 1980.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

THE MOSES H. CONE MEMORIAL HOSPITAL,
Plaintiff

v.

MERCURY CONSTRUCTION CORPORATION and J.N. PEASE ASSOCIATES,
Defendants

C-80-585-G

Date of Entry: December 24, 1980

ORDER OF REMAND

This matter came before the Court on December 22, 1980, for a hearing on plaintiff Moses H. Cone Memorial Hospital's motion to remand. In a Memorandum Opinion, filed contemporaneously herewith, the Court determined that this action was improvidently removed and should be remanded.

IT IS THEREFORE ORDERED that plaintiff's motion to remand be, and the same hereby is, GRANTED and that this action be, and the same hereby is, REMANDED to the state court from which it was removed.

Hiram H. Ward
United States District Judge

December 24th, 1980.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

MERCURY CONSTRUCTION CORPORATION,	:	
Petitioner	:	
v.	:	C-80-586-G
THE MOSES H. CONE MEMORIAL HOSPITAL,	:	
Respondent	:	

Date of Entry: December 24, 1980

ORDER OF STAY

This matter came before the Court on December 22, 1980, for a hearing on defendant Moses H. Cone Memorial Hospital's motion for a stay of this action. The Court has in an Order of Remand, filed contemporaneously herewith, remanded an action entitled *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, C-80-585-G (December 24, 1980), to the state court from which it was removed. That case involves the identical issue of arbitrability of the claims of Mercury Construction Corp. against the Moses H. Cone Memorial Hospital which is involved in this action. Thus, a stay of this action pending resolution of the state court action is appropriate. *E.C. Ernst, Inc. v. Potlatch Corp.*, 462 F. Supp. 694, 699-701 (S.D.N.Y. 1978).

IT IS THEREFORE ORDERED that this action be, and the same hereby is, STAYED pending resolution of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp. and J.N. Pease Associates*, 80 CvS 6787, in the North Carolina General Court of Justice, Superior Court Division (Greensboro).

Hiram H. Ward
United States District Judge

December 24th, 1980.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1009

In Re: Mercury Construction Corp.,

Petitioner

Filed: February 6, 1981

ORDER

After consideration of the motion of the petitioner Mercury Construction Corporation for a writ of mandamus to the United States District Court for the Middle District of North Carolina, and for an order staying certain State Court proceedings ,

IT IS ORDERED, That the application for the writ is directed to be heard by a panel of this court consisting of the undersigned, and Judge H. Emory Widener and Judge Kenneth K. Hall, at a hearing set for three o'clock p.m., February 12, 1981, at the Federal Court House in Asheville, North Carolina. Leave is granted the Moses H. Cone Memorial Hospital to appear at such hearing and to be heard.

The Clerk of this Court shall advise counsel for both the petitioner and the Moses H. Cone Memorial Hospital of the date set for the hearing herein.

Done with the approval of Judges Widener and Hall.

For the Court:
/S/ Donald Russell
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1009

In Re:

Mercury Construction Corporation,

Petitioner

No. 81-1042

Mercury Construction Corporation,

Appellant,

versus

The Moses H. Cone Memorial Hospital,

Appellee.

Filed: February 12, 1981

ORDER

IT IS ORDERED that:

the parties are directed to submit simultaneous briefs to the Clerk of the United States Court of Appeals for the Fourth Circuit at Richmond, Virginia, on or before February 22, 1981.

Entered at the direction of Judge Russell with the concurrance of Judge Widener and Judge Hall.

FOR THE COURT

/S/ William K. Slate II
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
CIVIL ACTION NO. C-80-586-G

MERCURY CONSTRUCTION CORPORATION, *Petitioner,* vs. THE MOSES H. CONE MEMORIAL HOSPITAL, *Respondent.*	NOTICE OF APPEAL

Filed: January 7, 1981

Notice is hereby given that Mercury Construction Corporation, petitioner above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the order of The Honorable Hiram H. Ward, United States District Judge for the Middle District of North Carolina, dated December 24, 1980, wherein proceedings on a petition for an order enforcing an arbitration agreement pursuant to 9 U.S.C. § 1 *et seq.* was stayed.

This notice of appeal is alternative to and in connection with a petition for writ of mandamus addressed to the United States Court of Appeals for the Fourth Circuit, filed and served contemporaneously herewith.

This 7 day of January, 1981.

/S/ Charles E. Nichols
Counsel for Mercury Construction Corporation

/S/ Lindsay R. Davis, Jr.
Counsel for Mercury Construction Corporation

OF COUNSEL:

NICHOLS, CAFFREY, HILL, EVANS & MURRELLE
Post Office Box 989
Greensboro, North Carolina 27402
Telephone: (919) 379-1390

BRADLEY, ARANT, ROSE & WHITE
1500 Brown-Marx Building
Birmingham, Alabama 35203
Telephone: (205) 252-4500

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1042
(Civil Action No. C-80-586-G)

Mercury Construction Corporation, *Appellant,* vs. The Moses H. Cone Memorial Hospital, *Appellee*	RESPONSE TO MOTION TO DISMISS APPEAL

Filed: February 3, 1981

Mercury Construction Corporation (Mercury), through counsel, hereby responds to the Motion to Dismiss Appeal of The Moses H. Cone Memorial Hospital (the Hospital), as follows:

ISSUE PRESENTED

Is an order of a District Court staying proceedings under Title 9 of the United States Code pending disposition of a related state court action appealable?

ARGUMENT

1. *The order is appealable under 28 U.S.C. § 1291.* The Hospital's motion cites cases from four circuits to support the proposition that a stay order is not appealable either under 28 U.S.C. § 1291 or § 1292(a). The Hospital fails to cite *Amdur v. Lizars,* 372 F. 2d 103 (4th Cir. 1967), in which this Court recognized that such orders *are* appealable as "final decisions" under 28 U.S.C. § 1291, under circumstances whereby the stay, for all practical purposes, effects a *dismissal* of the federal cause. *Id.* at 106.

That the stay order has the practical effect of "dismissing" Mercury's petition to compel arbitration in the Middle District of North Carolina is clear. Indeed, the Hospital maintains in its response to Mercury's petition to stay court proceedings that the state court has the "power and competence" to apply the Federal Arbitration Act. (Hospital's Response, p. 8.) If true, the issues

raised by Mercury's petition in the Federal Court will never be heard there. To be sure, then, the practical effect of the stay order is to dismiss the Title 9 petition.

While it has long been the rule in the Federal Courts that appellate jurisdiction is ordinarily limited to "final decisions," *Cobbledick v. United States*, 309 U.S. 323, 60 S.Ct. 540, 84 L. Ed. 783 (1940), the Supreme Court has firmly advised that "finality" is to be determined by a "practical rather than a technical construction." *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 1226, 93 L. Ed. 1528, 1536 (1949); *see also, Brown Shoe Co. v. United States*, 370 U.S. 294, 306, 82 S. Ct. 1502, 8 L. Ed. 2d 510, 524 (1962); *In re Grand Jury Proceedings*, 525 F. 2d 151 (3d Cir. 1975).

Applying these principles to the case at bar, the stay order is appealable as a final decision under § 1291.[1]

2. *Even if the stay order is not appealable under 28 U.S.C.* § 1291, *it is appropriate to consider the appeal as a petition for writ of mandamus.* Even in circuits which have not recognized the appealability of stay orders under circumstances such as those presented here, appeals have been treated as petitions for writs of mandamus.[2] *See, e.g., Cotler v. Inter-County Orthopedic Ass'n*, 526 F. 2d 537 (3d Cir. 1975) - writ granted; *Dellinger v. Mitchell*, 442 F. 2d 782 (D.C. Cir. 1971) - writ granted; *Lyons v. Westinghouse*, 222 F. 2d 184 (2d Cir. 1955) - writ not granted.

Inasmuch as the issue here is not whether a writ should issue, but how the appeal should be treated, Mercury does not discuss these cases. However, Mercury does urge the Court to consider the appeal as a petition for writ of mandamus, should the stay order be determined to be "interlocutory."

CONCLUSION

Mercury respectfully submits that the Hospital's Motion to Dismiss Appeal should be denied.

Respectfully submitted,

Charles E. Nichols
Counsel for Mercury Construction Corporation

[1] Mercury has not attempted an appeal under 28 U.S.C. § 1292(a); consequently, the Hospital's argument that Mercury has not met the essential requirements of that provision is immaterial.

[2] Mercury has alternatively sought mandamus with respect to this stay order.

Lindsay R. Davis, Jr.
Counsel for Mercury Construction Corporation

OF COUNSEL:

NICHOLS, CAFFREY, HILL, EVANS & MURRELLE
Post Office Box 989
Greensboro, North Carolina 27402
Telephone: (919) 379-1390

BRADLEY, ARANT, ROSE & WHITE
1500 Brown-Marx Building
Birmingham, Alabama 35203

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Response to Motion to Dismiss Appeal was served upon the appellee, The Moses H. Cone Memorial Hospital, by forwarding a copy thereof, by first-class mail, postage prepaid to Mr. Stephen P. Millikin, Smith, Moore, Smith Schell & Hunter, 500 NCNB Building, Post Office Box 21927 Greensboro, North Carolina 27420, attorney for The Moses H. Cone Memorial Hospital.

This the 2 day of February, 1981.

Lindsay R. Davis, Jr.
Counsel for Mercury Construction Corporation

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. C-80-586-G

MERCURY CONSTRUCTION CORPORATION, *Petitioner,* vs. THE MOSES H. CONE MEMORIAL HOSPITAL, *Respondent,*	STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

In conformity with Rule 10 (b) (3), Fed. R. App. P., Mercury Construction Corporation hereby sets forth the issues it intends to present on the appeal, as follows:

1. Did the District Court err in entering an order staying proceedings upon the petition to compel arbitration, pending proceedings in a related action in the North Carolina State Courts?

This 14 day of January, 1981.

/S/ Charles E. Nichols,
Counsel for Mercury Construction Corporation

/S/ Lindsay R. Davis, Jr.
Counsel for Mercury Construction Corporation

OF COUNSEL:

NICHOLS, CAFFREY, HILL, EVANS & MURRELLE
Post Office Box 989
Greensboro, North Carolina 27402
(919) 379-1390

BRADLEY, ARANT, ROSE & WHITE
1500 Brown-Marx Building
Birmingham, Alabama 35203
(205) 252-4500

28 U.S.C. § 1292. Interlocutory decisions.

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

9 U.S.C. § 4. Failure to arbitrate under agreement.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner

provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jursidiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Joint Appendix

Supreme Court, U.S.
FILED
APR 7 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1203

IN THE

Supreme Court of the United States

October Term, 1981

THE MOSES H. CONE MEMORIAL HOSPITAL,
Petitioner

v.

MERCURY CONSTRUCTION CORPORATION,
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

Jack W. Floyd
SMITH MOORE SMITH
SCHELL & HUNTER
P.O. Box 21927
Greensboro, North Carolina 27420
(919) 378-1450
Attorney for Petitioner

A. H. Gaede, Jr.
BRADLEY, ARANT, ROSE
& WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500
Attorney for Respondent

PETITION FOR CERTIORARI FILED DECEMBER 28, 1981
CERTIORARI GRANTED FEBRUARY 22, 1982

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Docket Numbers

Petition under Title 9 to Compel Arbitration
District Court: C-80-586-G
Court of Appeals: 81-1042

Petition for Writ of Mandamus, or in the Alternative, Notice of Appeal
Court of Appeals: 81-1009

Chronology

1.	Petition under Title 9, United States Code, to Compel Arbitration, filed by Mercury, C-80-586-G	October 27, 1980
2.	Response to Petition to Compel Arbitration, filed by Hospital	October 31, 1980
3.	Motion for Stay of Title 9 Petition, filed by Hospital	November 17, 1980
4.	Argument on Hospital's Motion to Stay before the United States District Court for the Middle District of North Carolina, Judge Hiram Ward presiding	December 22, 1980
5.	Order of Stay, entered by District Judge Ward	December 24, 1980
6.	Notice of Appeal from Order of Stay, filed by Mercury	January 7, 1981
7.	Petition for Writ of Mandamus, or in the Alternative, Notice of Appeal, filed by Mercury in U.S. Court of Appeals for the Fourth Circuit, No. 81-1009	January 12, 1981

8.	Statement of Issues to be Presented on Appeal, filed by Mercury	January 15, 1981
9.	Motion for Order Staying State Court Proceedings, filed by Mercury in 81-1009	January 21, 1981
10.	Response to Motion for Stay of State Court Proceedings, filed by Hospital in 81-1009	January 26, 1981
11.	Motion to Dismiss Appeal, filed by Hospital	January 28, 1981
12.	Response to Motion to Dismiss Appeal, filed by Mercury	February 4, 1981
13.	Order Setting Argument on Mercury's Mandamus Petition, issued by Court of Appeals in 81-1009	February 6, 1981
14.	Hearing on Mandamus Petition before Three-Judge Panel of the Court of Appeals in Asheville, North Carolina	February 12, 1981
15.	Order Directing Parties to File Simultaneous Briefs with Additional Authorities on or before February 22, 1981, issued by Court of Appeals in 81-1009 and 81-1042	February 12, 1981
16.	Reargument before United States Court of Appeals for the Fourth Circuit, sitting en banc, in 81-1009 and 81-1042	June 1, 1981
17.	Opinion issued by the United States Court of Appeals for the Fourth Circuit, sitting en banc, in 81-1009 and 81-1042	August 12, 1981

18.	Petition for Rehearing, filed by Hospital in 81-1009 and 81-1042	August 26, 1981
19.	Opinion and Order of United States Court of Appeals for the Fourth Circuit Denying Petition for Rehearing	November 24, 1981
20.	Motion for Stay of Mandate, filed by Hospital in 81-1009 and 81-1042	November 30, 1981
21.	Order Granting Stay of Mandate, issued by Court of Appeals	December 1, 1981
22.	Petition for Certiorari, filed by Hospital in 81-1009 and 81-1042	December 28, 1981
23.	Response to Petition for Certiorari, filed by Mercury in 81-1009 and 81-1042	January 27, 1982
24.	Order Granting Writ of Certiorari	February 22, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
C-80-586-G

MERCURY CONSTRUCTION CORPORATION, *Petitioner,*	)	
vs.	)	**PETITION**
THE MOSES H. CONE MEMORIAL HOSPITAL, *Respondent.*	)	

Filed October 27, 1980

Petitioner, petitioning the Court under Title 9 of the United States Code, and other applicable authority, avers:

1. This Court has jurisdiction of the subject matter of this action by reason of the diversity of citizenship existing between petitioner and respondent, 28 U. S. C. § 1332, and the amount in controversy exceeds $10,000.00, exclusive of interest and costs. In addition, petitioner seeks relief under 9 U. S. C. § 1 et seq. (United States Arbitration Act), and the contract containing the agreement to arbitrate provided for commerce between the States as contemplated by Title 9 of the United States Code.

2. Petitioner is a corporation organized and existing under the laws of the State of Delaware, and its principal place of business is in Montgomery, Alabama.

3. Respondent is a corporation organized and existing under the laws of the State of North Carolina, and its principal place of business is in Greensboro, Guilford County, North Carolina.

4. Pursuant to contract between the parties dated July 15, 1975, petitioner undertook to perform the work in

connection with the construction of certain improvements and additions to respondent's property located in Greensboro, Guilford County, North Carolina (hereinafter "the Work"). For a more complete description of the Work see copy of contract attached as Exhibit A to Affidavit of Bobby Head, dated October 15, 1980, which is incorporated herein by reference.

5. At this point, a balance of $1.7 million, plus interest and costs, is due and owing by respondent to petitioner under the terms and provisions of the aforesaid contract, which balance respondent has failed and refused to pay.

6. Paragraph 2.2.10 of the aforesaid contract requires the parties to arbitrate disputes, including, without limitation, any dispute whether respondent owes the petitioner the amount claimed.

7. Notwithstanding the provisions of Paragraph 2.2.10 of the aforesaid contract, and the demand of petitioner, respondent refuses to arbitrate its refusal to pay petitioner. Respondent has instead instituted an action in the General Court of Justice, Superior Court Division, Guilford County, North Carolina, entitled "The Moses H. Cone Memorial Hospital vs. Mercury Construction Corporation and J. N. Pease Associates", seeking *inter alia* a declaratory judgment that it is not liable to petitioner in any amount.

8. Petitioner is entitled, and herein seeks, to enforce Paragraph 2.2.10, and other applicable provisions of the aforesaid contract. Petitioner is ready, willing and able to proceed with arbitration in accordance with the applicable terms and provisions of the contract.

WHEREFORE, petitioner prays:

1. That the court enter an Order under 9 U.S.C. § 4, directing that arbitration proceed in the manner pro-[sic] for in the aforesaid contract, and staying all other action, including without limitation the aforesaid action the [sic] the North Carolina State court, pending completion of arbitration;

2. That the costs of action, including petitioner's reasonable attorneys' fees and expenses, be taxed against

respondent; and

3. That the Court grant such other and further relief as may be just and proper.

This 27 day of October, 1980.

/S/ Charles E. Nichols
Counsel for petitioner

/S/ Edward L. Murrelle
Counsel for petitioner

/S/ Lindsay R. Davis, Jr.
Counsel for petitioner

OF COUNSEL:

NICHOLS, CAFFREY, HILL, EVANS & MURRELLE
Post Office Box 989
Greensboro, North Carolina 27402
919 - 379-1390

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

MERCURY CONSTRUCTION CORPORATION, *Petitioner,*	)	
vs.	)	Civil Action No. 80-586-G
THE MOSES H. CONE MEMORIAL HOSPITAL, *Respondent.*	)	

Filed October 31, 1980

RESPONSE TO PETITION

NOW COMES Moses H. Cone Memorial Hospital (Hospital), responding to the petition to compel arbitration filed on behalf of Mercury Construction Corporation (Mercury) the 27th day of October, 1980, and says:

1. This Court should refuse to entertain the petition by reason of the fact that the Hospital's action against Mercury, referred to in paragraph 7 of the petition, was wrongfully removed to this Court and should be remanded to the Superior Court of Guilford County. In the State Court action a hearing upon the question of arbitration was requested by Hospital. State law expressly applicable to the contract between the parties, provides for a summary trial forthwith. N.C.G.S. § 1-567.3(b). This Court should abstain from interference with the action duly instituted in the State Court wherein the question of arbitration is at issue.

2. If this Court should entertain said petition, the Hospital asserts that compliance with the arbitration provisions of the contract between the parties is in issue for the reasons stated in the complaint, referred to in paragraph 7 of the petition, in that Mercury is in default in proceeding

with arbitration and in complying with express conditions of the agreement to arbitrate.

3. Should the Court determine that any proceedings are in order by reason of said petition, the Hospital demands a jury trial on the issues as provided by 9 U.S.C. § 4, and requests an order of this Court preventing arbitration until that issue may be determined by the Court.

4. As to the allegations contained in the petition, Hospital admits the allegations of paragraphs 2 and 3 and denies the allegations of paragraphs 1, 5, 6 and 8. As to paragraph 4, Hospital admits that Mercury performed the work in Guilford County, North Carolina but does not admit all of the averments contained in the Head affidavit. As to the allegations of paragraph 7, the factual allegations are admitted, but the inference that paragraph 2.2.10 of the contract applied to the dispute reflected in the State Court complaint at the time the complaint was filed is expressly denied.

This 31st day of October, 1980.

/S/ Stephen P. Millikin

/S/ Jack W. Floyd

/S/ Douglas William Ey, Jr.
Attorneys for Respondent

Of Counsel:

SMITH MOORE SMITH SCHELL & HUNTER
500 NCNB Building - P.O. Box 21927
Greensboro, North Carolina 27420
Telephone: (919) 378-1450

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
C-80-586-G

MERCURY CONSTRUCTION CORPORATION, *Petitioner,*	) MOTION OF CONE HOSPITAL FOR STAY OF MERCURY'S PETITION UNDER TITLE 9 OF THE UNITED STATES CODE
vs.	
THE MOSES H. CONE MEMORIAL HOSPITAL, *Respondent.*	

Filed November 17, 1980

The Moses H. Cone Memorial Hospital, through counsel, respectfully moves, pursuant to Rule 7(b) of the Federal Rules of Civil Procedure and Local Rule 21, that this Court exercise its discretion and enter an Order herein staying consideration of Mercury's Petition to Compel Arbitration filed under Title 9 of the United States Code pending resolution of the identical issues in the prior State Court action which has been improperly removed to this Court and which should be remanded to the Superior Court of Guilford County. *E. C. Ernst, Inc.* v. *Potlatch Corp.*, 462 F. Supp. 694 (S.D.N.Y. 1978).

This Motion is supported by the Legal Memorandum and Affidavits filed on behalf of The Moses H. Cone Memorial Hospital on November 17, 1980, in Civil Action Number C-80-585-G and C-80-586-G, which are incorporated herein by reference.

This 17th day of November, 1980.

/S/ Stephen P. Millikin

/S/ Jack W. Floyd

/S/ Douglas W. Ey, Jr.

Attorneys for The Moses H. Cone Memorial Hospital

OF COUNSEL:

SMITH MOORE SMITH SCHELL & HUNTER
500 NCNB Building
P.O. Box 21927
Greensboro, North Carolina 27420
Telephone: (919) 378-1450

[Certificate of Service Omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 81-1009

In Re:	)
	)
Mercury Construction	)
Corp.,	)
Petitioner.	)

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, OR IN THE ALTERNATIVE, NOTICE OF APPEAL

Filed January 12, 1981

COMES NOW Petitioner, Mercury Construction Corporation (Mercury), and prays that this Court issue a writ of mandamus directing that the United States District Court for the Middle District of North Carolina vacate its order of stay dated December 24, 1980 and proceed forthwith to rule upon Mercury's petition under Title 9 of the United States Code, to compel arbitration, which was filed in said Court on October 27, 1980. (Exhibit A.)[1] Alternatively, should this Court determine that mandamus will not lie, petitioner requests that its petition be treated as a notice of appeal. The grounds for this petition are as follows:

1. There is diversity of citizenship between Mercury Construction Corporation and the respondent, Moses H. Cone Memorial Hospital (the Hospital).

2. Mercury and the Hospital entered into a contract in August, 1975, whereby Mercury was to be the general contractor for certain renovations and alterations to the Hospital. That contract (¶ 7.10.1 of the General Conditions) contained

[1] In *Mercury Construction Corporation v. The Moses H. Cone Memorial Hospital*, Civil Action No. C-80-586-G.

an agreement to arbitrate all claims, disputes, and other matters "arising out of or related to this contract or the breach thereof. . . ." (*See* Mercury Memorandum.) [2]

3. During the course of the work certain claims and disputes arose between the parties to the contract. The amount in controversy exceeds One Million Dollars ($1,000,000.00), exclusive of interest and costs. (Mercury Petition.)

4. After negotiations concerning those disputes in the spring and summer of 1980, the parties scheduled a settlement conference for October 13, 1980. On October 8, 1980, Mr. Millikin, counsel for the Hospital, called Mr. Bynum, counsel for Mercury, and informed him that the Hospital was filing suit in the General Court of Justice, Superior Court Division in Greensboro that day. (Bynum Affidavit.) (Exhibit C.) Service was obtained on Mercury on October 9, 1980.

5. The Hospital named Mercury and the Architect, J. N. Pease Associates, Inc. (Pease), as defendants. There was no diversity between Pease and the Hospital. The complaint sought a declaratory judgment that the Hospital was not obligated to arbitrate its dispute with Mercury and that the Hospital owed Mercury nothing. Alternatively, the complaint asked for a judgment against Pease in the event that the Hospital was held liable to Mercury. (Hospital's Complaint.) (Exhibit D.)

6. On October 9, 1980, Mercury sent an arbitration demand to the American Arbitration Association as called for by ¶ 7.10.2 of the contract. (Head Affidavit.) (Exhibit E.) On October 15, the Hospital obtained without notice to Mercury an *ex parte* injunction restraining Mercury from "taking any action or actions directed toward arbitration of disputes" between the Hospital and Mercury. (Order of Honorable Hal H. Walker, Superior Court Judge, dated October 15, 1980.) (Exhibit F.)

[2] Reference is to Mercury's Memorandum in support of petition to compel arbitration, filed October 27, 1980. (Exhibit B.)

8. Mercury promptly moved the Superior Court to dissolve the *ex parte* injunction order, expressly reserving all of its rights, including its right to arbitrate. (Motion.) (Exhibit G.) On October 27, the Superior Court dissolved the stay. (Order of Honorable Hal H. Walker, Superior Court Judge, dated October 27, 1980.) (Exhibit H.) The same day Mercury filed a petition to compel arbitration in the United States District Court for the Middle District of North Carolina (Civil Action No. C-80-586-G) (Petition.) (Exhibit B.) and, pursuant to 28 U.S.C. § 1441 (c), removed the Hospital's action from the Superior Court to the said District Court (Civil Action No. C-80-585-G). (Removal Petition.) (Exhibit I.)

9. Both parties filed several affidavits and memoranda of law in the District Court on the merits of the arbitrability issue. In addition, the Hospital filed a motion to remand the removed action and a motion to stay proceedings on Mercury's petition to compel arbitration pending disposition by the State Court of the removed action after remand. (Hospital's Motion.) (Exhibit J.)

10. At a hearing on December 22, 1980, the Court heard only the Hospital's motion, and on December 24, 1980, entered its Orders remanding the removed action to State Court and staying action on Mercury's petition to compel arbitration. (Orders.) (Exhibits K, L.)[3]

ISSUES[4]

A. Does a District Court, where each of the jurisdictional elements contained in the Federal Arbitration Act, 9 U.S.C. §§ 1-9, are present (*i.e.*, a written agreement to arbitrate, a contract involving interstate commerce, diversity of citizenship, and the requisite jurisdictional amount) have discretion to refuse to rule on a petition to compel arbitration?

---

[3] Judge Ward's Opinion is attached as Exhibit M.

[4] The reasons why a writ should issue are stated in the issues presented.

B. Even if a District Court in some circumstances has discretion to stay proceedings to compel arbitration, did the District Court in this instance abuse its discretion in that:

1. The Hospital filed its action in State Court first only by virtue of the course of conduct described in ¶¶ 4-8 above and Mercury, as soon as practicable thereafter, demanded arbitration and instituted proceedings in the District Court to compel arbitration?

2. To Mercury's knowledge, the courts of North Carolina have never ruled on the issue of whether they will apply the Federal Arbitration Act, and it is conceivable that they will decline to do so?

3. The Federal Arbitration Act pre-empts any inconsistent provisions of state law?

4. The Federal Courts, not the State Courts, are the authoritative interpreters of the Federal Arbitration Act?

5. Both parties have fully briefed the merits of the arbitrability question in the District Court, and all that remains to be done is for that Court to hear oral argument and rule; conversely, no materials on the merits were filed in State Court?

6. The intent of the Federal Arbitration Act is a speedy resolution in Federal Court of the issue of arbitrability, and there is a strong Federal policy, supported by an overwhelming weight of authority, favoring enforcement of arbitration agreements?

REASONS WHY WRIT SHOULD ISSUE[5]

The reasons why the writ should issue in this instance are self-evident from the manner in which Mercury has presented the issues, and extensive repetition will be avoided. In short, the stay of the Title 9 petition runs counter to the strong Federal policy expressed in the Arbitration Act (9 U.S.C. § 1

[5] In compliance with Rule 21(a) and (c), Fed. R. App. P., Mercury has not included citation of authority in this petition. Supporting authority is extensive and will be cited, should the Court require briefs.

et seq.), that arbitration is a desirable alternative to litigation and is to be encouraged by the Federal courts. In this regard, Mercury emphasizes that the statute itself, 9 U.S.C. § 4, is mandatory in its wording, admitting of no discretion.

Secondly, it is submitted that the District Court erred in determining that the issues raised in the State Court are identical. There is no certainty that the State Courts will apply the Federal Arbitration Act, with its very limited inquiry into factual disputes, or that they will recognize Federal precedent.

Finally, that the Hospital, through its course of conduct, "won the race to the courthouse," is insufficient reason to defer to the State Courts in matters of such significant Federal concern. The Congress, in enacting the Federal Arbitration Act, expressed a will to encourage the use of arbitration and an intent to provide procedures for the quick and efficient enforcement of arbitration agreements. The Federal Courts, in case after case, have recognized that will and intent, in construing and enforcing such agreements. The District Court should do so here.

This 7 day of January, 1981.

/S/ Charles E. Nichols, Counsel for
Mercury Construction Corporation

/S/ Lindsay R. Davis, Jr., Counsel for
Mercury Construction Corporation

OF COUNSEL:

NICHOLS, CAFFREY, HILL,
EVANS & MURRELLE
Post Office Box 989
Greensboro, North Carolina 27402
Telephone: (919) 379-1390

[Certificate of Service Omitted]

[Exhibit K (Order of Remand), Exhibit L (Order of Stay) and Exhibit M (Memorandum Opinion) are printed in the Certiorari Appendix at A37, A38 and A33, respectively. Exhibit A (Title 9 Petition) is printed *supra* at JA4. Exhibit D (Complaint) is printed *infra* at JA17. All other Exhibits to the Petition for Mandamus have been omitted.]

[EXHIBIT D TO MANDAMUS PETITION]

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
GUILFORD COUNTY	(GREENSBORO) 80 CVS 6787

THE MOSES H. CONE MEMORIAL HOSPITAL, *Plaintiff,*	)	
vs.	)	**COMPLAINT**
MERCURY CONSTRUCTION CORPORATION and J.N. PEASE ASSOCIATES, *Defendants.*	)	

Filed October 8, 1980

The plaintiff, complaining of the defendants, says:

1. The plaintiff is a corporation organized and existing under the laws of the State of North Carolina and is engaged in the ownership and operation of a hospital in Greensboro, Guilford County, North Carolina.

2. The defendant, Mercury Construction Corporation, is a corporation organized and existing under the laws of the State of Delaware, is engaged in the construction business as a general contractor, and has its principal place of business in Montgomery, Alabama. At all times here in question Mercury Construction Corporation was present and was doing business in North Carolina and is doing business in North Carolina at the present time.

3. The defendant, J. N. Pease Associates, is a corporation organized and existing under the laws of the State of

North Carolina, is engaged in the business of architecture and engineering, and has its principal place of business in Charlotte, North Carolina.

4. This is a declaratory judgment action brought pursuant to the provisions of Article 26 of Chapter 1 of the General Statutes of North Carolina for the purpose of having this court determine and declare the rights, obligations, status, and legal relations of the parties hereto under certain contracts which will be referred to with more particularity hereinafter.

5. The plaintiff (hereinafter referred to as Cone Hospital) entered into a contract with J. N. Pease Associates (hereinafter referred to as Pease) under date of February 27, 1969, which contract was designated as THE STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT, AIA DOCUMENT B211, SEPTEMBER 1963 EDITION, by which Pease as architect agreed to provide professional services for Cone Hospital as owner for a project described in said contract as the making of certain additions and alterations at Cone Hospital. The "professional services" were defined in this contract to include both architectural and engineering services, and engineering services were defined to include structural, heating, air conditioning, ventilating, plumbing, refrigeration and electrical engineering. This initial contract between Cone Hospital and Pease consisted of four pages. An addendum to this contract was executed March 5, 1975, with an Appendix (A) and Appendix (B) attached. This contract consisting of these seven pages is attached hereto as the plaintiff's Exhibit 1 and made a part of this complaint.

6. Pursuant to the contract between Cone Hospital and Pease referred to hereinabove, Pease as architect and engineer did undertake to plan additions and alterations to Cone Hospital in Greensboro, North Carolina, and did undertake to furnish the full services called for by Article 3 and other parts of the agreement between Cone Hospital and Pease.

7. Cone Hospital entered into a contract with the defendant, Mercury Construction Company (hereinafter referred to as Mercury), on July 15, 1975 for the performance of all work required by the contract documents for additions and alterations to The Moses H. Cone Memorial Hospital at Greensboro, North Carolina, this being designated as Project No. N.C. — 488 (T-24), this contract being entitled STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONTRACTOR, AIA DOCUMENT A101, SEPTEMBER 1967 EDITION, a duplicate copy of which is attached hereto and made a part of this complaint as Exhibit 2, this consisting of 20 pages, including 15 pages attached to the five-page AIA Document A101 Standard Form of Agreement Between Owner and Contractor.

8. Also attached hereto and made a part of this complaint as Exhibit 3 is the sixteen-page GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, AIA DOCUMENT A201, the nine-page SUPPLEMENTARY CONDITIONS OF THE CONTRACT FOR CONSTRUCTION, FEDERAL EDITION, AIA DOCUMENT A201/SC and the two-page cover, all being a part of the contract between Cone Hospital and Mercury. In addition, the contract between Cone Hospital and Mercury included additional supplementary conditions, general requirements, plans and drawings, specifications, and various addenda.

9. The time agreed upon in the contract between Cone Hospital and Mercury for completion of the aforesaid project was 1200 consecutive calendar days (approximately 40 months). The contract work was started by Mercury July 31, 1975. Thereby November 11, 1978 was established as the completion date for the project at the outset. During the course of the work time extensions were granted under various change orders for a total of 334 days. These time extensions carried the contract time for completion to October 14, 1979. There was a substantial completion of the

project as determined by Pease as architect as of February 12, 1979, a substantial completion of the project as agreed to by Cone Hospital as owner as of March 14, 1979, and final inspections were completed as of June 12, 1979, all well within the contract completion time as extended. Various punch list items have been carried out since this latter date.

10. Long after the substantial completion of this construction project and long after its acceptance by Cone Hospital as owner, Mercury presented to Pease, on or about January 31, 1980, claims against Cone Hospital, designated by form as a request for an equitable adjustment to the contract, or an addition to the contract price, but which in substance are damage claims for alleged breaches of contract on the part of Cone Hospital in causing alleged delays, impact inefficiencies, and other problems to Mercury during the course of the work, by which claims Mercury alleged damages against Cone Hospital in the amount of $2,322,650.00. A breakdown of these claims by way of figures is attached hereto as Exhibit 4.

11. Pease as architect did not advise Cone Hospital that Mercury was asserting these claims, but rather Pease undertook to discuss the claims with Mercury over a period of time of several months. Upon information and belief, at some point in time a breakdown of Mercury's claims was presented to Pease, showing a reduced total of $1,246,368.00. A duplicate copy of the breakdown of figures on these claims as transmitted to Cone Hospital is attached hereto as Exhibit 5.

12. Cone Hospital did not know of these claims for damages being asserted against it by Mercury until advised of this by Pease on or about April 17, 1980, at which time Pease furnished to Cone Hospital various written materials by way of information, including a copy of a narrative statement of the Mercury claims, a duplicate copy of which is attached hereto as Exhibit 6 and made a part of this complaint. Since that time Cone Hospital has attempted to acquire needed information and documents in an effort to determine the basis

for and validity of these damage claims being asserted against it by Mercury. Cone Hospital has discussed this situation with Pease and with Mercury, has reviewed written information available to it, and Cone Hospital has determined that these damage claims being asserted against it by Mercury are without factual or legal basis and are not valid.

13. The position and contentions of Mercury appear to be essentially as set forth in the so-called narrative of Mercury in support of its request for an equitable adjustment which is attached hereto as Exhibit 6. In that narrative statement, which purports to constitute a formal claim for damages under paragraphs 2.2.6. through 2.2.11 of the contract between Mercury and Cone Hospital, Mercury contends that it has been damaged in an amount of at least $1,246,368.00, that it has the right to assert even greater damages, and that its claims are initially being presented to Pease as architect for a decision, which claims and architect's decision it contends are subject to arbitration upon the written demand of either Mercury or Cone Hospital under Section 2.2.10 of the General Conditions of the contract. Mercury further contends by this narrative statement that Cone Hospital:

> (1) Caused Mercury during the course of the work to have to change a planned sequence of construction;
>
> (2) Caused Mercury not to be able to work in and to complete entire areas;
>
> (3) Prevented Mercury from completing the project earlier than forty-seven and one-half months when it could have completed within thirty months;
>
> (4) Caused delays and inefficiencies to Mercury by requiring additional work and changed work covered by change orders, as the contract provided could be done, even though Mercury knew by experience that some changes would need to be made during the course of the job, and even though it agreed to the extra work and changes as covered by

the change orders;

(5) Caused Mercury to have to do the job in more phases than it had planned;

(6) Failed to vacate areas as early as Cone should have released areas to Mercury;

(7) Failed to occupy areas as early as Cone should have accepted new and renovated spaces;

(8) Caused Mercury to have to construct tunnels and access spaces;

(9) Caused there to be extra-contractual inspections and more inspections than anticipated;

(10) Furnished plans and drawings that were not accurate or complete;

(11) Took too long a time to make decisions;

(12) Improperly became involved with approval of submittals;

(13) Refused to release portions of the retainage due;

(14) Refused to accept the decisions of the architect;

(15) And generally caused damages to Mercury by way of inefficiencies and extended home office and field overhead, all as is set forth in the attached claim which is Exhibit 6.

14. Cone Hospital, on the other hand, takes the position that the claims and contentions of Mercury are without merit, are not valid, and are without basis in either fact or law, and contrary to what is contended by Mercury, Cone Hospital contends, *inter alia:*

(1) There is no legal liability on the part of Cone Hospital relating to any delays, inefficiencies, or other problems sustained by Mercury in carrying out the contract work for additions and renovations at Cone Hospital.

(2) There is no contract provision which allows the claims being asserted by Mercury.

(3) There has been no breach of contract and no

default by Cone Hospital which would give any grounds for Mercury's claims against Cone Hospital.

(4) The initial construction schedule furnished to Cone Hospital by Mercury showed a planned construction time of 40 months and not the 30 months as now contended by Mercury, and no subsequent schedule was ever submitted by Mercury.

(5) Delays caused by Cone Hospital in the progress of the contract work, if any, were justified, reasonable, for good cause, were not outside the contract, and were not unreasonable or arbitrary or capricious.

(6) Delays in the progress of the work, inefficiencies and changes were anticipated by the parties, were contemplated by the provisions of the contract, and were expected by Mercury from its experience and from the type and scope of contract work undertaken to be accomplished.

(7) All extra work and changes were carried out under change orders as called for by the contract. Under these change orders and the relevant contract provisions Mercury has been paid in full for all work accomplished and all changes made, and has received extensions of time in relation to extra work, changes, and delays. The execution of these change orders and the work and payments thereunder constitute a full accord and satisfaction of all claims.

(8) The design, plans, drawings, and specifications were the work and responsibility of Pease and not Cone Hospital. If there were any deficiencies therein these were known or should have been known to Mercury.

(9) Mercury had no contractual right to the sequence of construction selected by it, and had no contractual right to work in and to transfer complete

areas at one time rather than smaller work areas.

(10) Mercury had no contractual right to the phasing and sequence that it may have anticipated. There has been no breach of contract or default on the part of Cone Hospital in causing more phases or a different sequence of work from that anticipated by Mercury.

(11) There has been no breach of contract or default on the part of Cone Hospital in relation to any of the so-called job problems referred to by Mercury in its narrative statement. At all times there was an express contractual obligation on the part of Mercury to carry out the contract work in a way and manner so as not to disrupt the normal services of the hospital.

(12) There has been no breach of contract or default on the part of Cone Hospital in relation to any of the design problems or other extra-contractual conditions referred to by Mercury in its narrative statement.

(13) There is no factual or legal basis, and no breach of contract or default on the part of Cone Hospital, which would give any grounds for damages for inefficiency and impact or for extended overhead as contended by Mercury.

(14) The claims of Mercury are barred by the applicable statute of limitations (G.S. 1-52).

(15) With regard to each of the claims asserted, Mercury has not demanded arbitration and has no right under the contract to have these claims or disputes submitted to arbitration. Mercury's inaction with respect to resolving these claims in the way and manner required by the contract, its dilatory conduct, and its failure to make timely demand for arbitration have resulted in substantial prejudice to Cone Hospital. Mercury has failed to demand arbitration within a reasonable time after each claim

arose as required by the contract, has failed to demand arbitration within the contractual statute of limitations, and has failed in general to satisfy conditions precedent to arbitration. Further, Mercury has waived its right to arbitrate and is barred from submitting these claims to arbitration by laches and estoppel.

15. Cone Hospital further contends that Mercury breached the contract and caused delay and other problems: by failing and refusing to schedule and coordinate the progress of the work with the owner so as to cause an absolute minimum of interference with or interruption to the normal activities within the existing hospital; by failing to schedule and coordinate the work so that areas could be completed within the shortest practical period of time and then be released to the owner for its use; by refusing to quote proposals; by delay in quoting proposals; by delay in furnishing information to Pease and Cone Hospital; by poor workmanship; by inadequate planning and supervision; by delay in completing work; by failing and refusing to cooperate with the owner; by failure to anticipate and provide for problems and changes; by arbitrary changes in sequence of work; by failure to keep the premises free from accumulation of waste materials and rubbish; by failing to have claims and disputes resolved during the progress of the work as required by the contract; and by other ways not specifically set forth hereinabove.

16. Cone Hospital further contends that Pease as architect breached the contracts and caused problems and delays: by not giving adequate and proper assistance in planning and developing the building program; by failure to foresee and provide for problems and changes; by preparing and providing plans and specifications containing errors and omissions; by inadequate supervision and administration; by premature acceptance of areas before such areas were properly usable for hospital purposes; by delay in making decisions and by delay in implementing its own decisions and decisions

of the owner and contractor; by delay in preparing and forwarding requests for proposals, revised drawings, instructions and other information to the contractor; by delay in forwarding proposals and other information to Cone Hospital; by not requiring disposition of claims and disputes during the course of the work as required by the contract provisions; by procrastination and by failing to rule on matters in dispute during the course of the work; by failing adequately to represent the interests of Cone Hospital; by not advising Cone Hospital promptly of the claims being asserted by Mercury; by breaching the fiduciary duty which Pease owed to Cone Hospital; and by other ways not specifically set forth hereinabove.

17. On the other hand both Mercury and Pease deny the contentions made adverse to them by Cone Hospital. Thereby a justiciable controversy exists and is presented, which controversy needs resolution by the court in this action.

18. Mercury has no right to have this controversy submitted to arbitration, and an order should be entered herein staying arbitration.

WHEREFORE, Cone Hospital prays:

1. That this court determine and declare that it has jurisdiction of this controversy, that there is no right to arbitration, and that arbitration be stayed;

2. That it be determined and declared that there is no liability on the part of Cone Hospital to Mercury in any amount whatsoever;

3. That should it be determined that any amount is owed by Cone Hospital to Mercury, that it be determined and declared that Cone Hospital is entitled to be fully indemnified and reimbursed such amount by Pease;

4. That Cone Hospital have and recover its costs from Mercury and Pease, including reasonable attorneys fees, and that it have such other and further relief as to the court may seem just and proper.

JURY TRIAL IS REQUESTED.

/S/ Stephen P. Millikin

/S/ Jack W. Floyd

/S/ Douglas W. Ey, Jr.

Attorneys for Cone Hospital

OF COUNSEL:
SMITH MOORE SMITH SCHELL & HUNTER
500 NCNB Building
P.O. Box 21927
Greensboro, N.C. 27420
Telephone: (919) 378-1450

[Summons Omitted]

SELECTED PORTIONS OF GENERAL CONDITIONS OF MERCURY/HOSPITAL CONTRACT

(Attached to Bettis Affidavit as Exhibit 3, filed by Hospital November 17, 1980)

2.2 ADMINISTRATION OF THE CONTRACT

. . . .

2.2.6 The Architect will be, in the first instance, the interpreter of the requirements of the Contract Documents and the judge of the performance thereunder by both the Owner and Contractor. The Architect will, within a reasonable time, render such interpretations as he may deem necessary for the proper execution or progress of the Work.

2.2.7 Claims, disputes and other matters in question between the Contractor and the Owner relating to the execution or progress of the Work or the interpretation of the Contract Documents shall be referred initially to the Architect for decision which he will render in writing within a reasonable time.

2.2.8. All interpretations and decisions of the Architect shall be consistent with the intent of the Contract Documents. In his capacity as interpreter and judge, he will exercise his best efforts to insure faithful performance by both the Owner and the Contractor and will not show partiality to either.

2.2.9 The Architect's decisions in matters relating to artistic effect will be final if consistent with the intent of the Contract Documents.

2.2.10 Any claim, dispute or other matter that has been referred to the Architect, except those relating to artistic effect as provided in Subparagraph 2.2.9 and except any which have been waived by the making or acceptance of final payment as provided in Subparagraphs 9.7.5 and 9.7.6, shall be subject to arbitration upon the written demand of either

party. However, no demand for arbitration of any such claim, dispute or other matter may be made until the earlier of:

2.2.10.1 The date on which the Architect has rendered his written decision, or

.2 the tenth day after the parties have presented their evidence to the Architect or have been given a reasonable opportunity to do so, if the Architect has not rendered his written decision by that date.

2.2.11 If a decision of the Architect is made in writing and states that it is final but subject to appeal, no demand for arbitration of a claim, dispute or other matter covered by such decision may be made later than thirty days after the date on which the party making the demand received the decision. The failure to demand arbitration within said thirty days' period will result in the Architect's decision becoming final and binding upon the Owner and the Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence but will not supersede any arbitration proceedings unless the decision is acceptable to the parties concerned.

. . . .

7.10 ARBITRATION

7.10.1 All claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof, except as set forth in Subparagraph 2.2.9 with respect to the Architect's decisions on matters relating to artistic effect, and except for claims which have been waived by the making or acceptance of final payment as provided by Subparagraphs 9.7.5 and 9.7.6, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by

the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

7.10.2 Notice of the demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect. The demand for arbitration shall be made within the time limits specified in Subparagraphs 2.2.10 and 2.2.11 where applicable, and in all other cases within a reasonable time after the claim, dispute or other matter in question has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

7.10.3 The Contractor shall carry on the Work and maintain the progress schedule during any arbitration proceedings, unless otherwise agreed by him and the Owner in writing.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
C-80-585-G
(Also Filed in C-80-586-G)

THE MOSES H. CONE MEMORIAL HOSPITAL, *Plaintiff,*	)	
	)	SUPPLEMENTAL AFFI-
vs.	)	DAVIT OF BOBBY
	)	HEAD
MERCURY CONSTRUCTION CORPORATION and J.N. PEASE ASSOCIATES, *Defendants.*	)	

Filed December 1, 1980

Bobby Head, being first duly sworn, deposes and says:

My name is Bobby Head. I signed the Affidavit previously filed on behalf of Mercury Construction Corporation in connection with this action. I did attend a meeting on October 7, 1980 at the office of J. N. Pease along with other representatives of Mercury and representatives of the Architect and the Owner. By virtue of the contract and custom in the industry, I considered the Architect's personnel to be representatives of the Owner. Prior to the meeting Mercury had submitted certain claims for extended overhead and impact costs. At the meeting, John Ward asked that Mercury separate its claims for extended overhead and impact costs from the direct cost of labor and materials used in performing change order work. He further requested that Mercury defer any extended overhead and impact cost claims that it then had or might have until the end of the job. The other representatives of Mercury and I agreed to this request and reserved Mercury's rights to present those claims at that

time. Neither Marvin Goldman nor Dr. John Watson, both of whom were present, raised any objection to this agreement at the meeting or at any time thereafter. Joe Hays of J. N. Pease prepared a memorandum setting forth what had transpired at the meeting. The Memorandum prepared by Mr. Hays shows copies sent to the Hospital and to Dr. Watson. The Memorandum was transmitted to Mercury by John Ward's letter dated October 11, 1977. A copy of the Memorandum and letter of transmittal is attached hereto as Exhibit A. In reliance on the agreement reached at the meeting, which was never rescinded, Mercury did not submit claims for extended overhead or impact costs during the performance of the work, although Mercury did notify the Owner on numerous occasions both orally and in writing that Mercury was being delayed or impacted in its work by various actions and inactions of the Owner. Punch list work was still being done during the last half of 1979, and the Owner called on Mercury to do warranty work as late as May of 1980, which Mercury did. As soon as practicable thereafter, Mercury analyzed its records and submitted its claims to the Owner through the Architect early in 1980. To the best of my knowledge, none of these claims involve matters as to which Mercury was notified in writing that the Architect was rendering a final decision denying the claim and giving Mercury 30 days in which to appeal the decision. The only decision by the Architect on Mercury's claims is that rendered on September 30, 1980 ruling that Mercury is entitled to additional compensation in an amount between $612,692 and $1,246,368.

This contract is not closed and final payment has not been made. Mercury recently received a request from the Hospital through John Ward for certain items necessary to "close the project". A copy of Mr. Ward's letter dated November 7, 1980 is attached hereto as Exhibit B.

/S/ Bobby Head

[Notarization Omitted]

EXHIBIT A

J.N. Pease Associates

Architecture
Engineering
Planning

October 11, 1977

Mr. Lloyd Williams
Mercury Construction Corporation
Box 144
Montgomery, Alabama 36101

Re: The Moses H. Cone Memorial Hospital
Greensboro, North Carolina;

Subject: Conference of 10/7/77

Dear Lloyd:

Attached is a copy of a memorandum prepared by Joe Hays following our conference on Friday. We believe the information contained in it to be an accurate record of subjects discussed and decisions reached. If either you or Bobby disagree, please let us receive that information as soon as possible.

It was a pleasure meeting you and meeting with you and the other members of the Mercury organization. We feel that we accomplished quite a bit - this remains to be seen.

We are expediting the change order for the X-Ray area and hope to get it out today.

Sincerely,

John V. Ward, AIA
JVW/cpb
Attachment
cc: Mr. Bobby Head

J.N. PEASE ASSOCIATES
ARCHITECTS ENGINEERS PLANNERS

CONFERENCE MEMORANDUM

To:	File	Project:	Moses Cone Hospital Greensboro, North Carolina
From:	Joseph G. Hays, Jr.		
Copy To:	Mercury Construction Corp. - Montgomery & *Greensboro* Moses Cone Hospital Dr. John Watson	Comm. No.:	4075
		Date:	October 7, 1977

PARTICIPANTS:

Mr. Lloyd Williams	- Mercury Construction Corporation
Mr. Bobby Head	- Mercury Construction Corporation
Mr. Ed Beck	- Mercury Construction Corporation
Mr. Dale Winship	- Mercury Construction Corporation
Mr. Norman Pease, Jr.	- JNPA
Mr. John Ward	- JNPA
Mr. Carlos Ashley	- JNPA
Mr. Joel Stegall	- JNPA
Mr. Jerry Stacy	- JNPA
Mr. Joe Hays	- JNPA
Mr. Bob Byrd	- JNPA
Mr. Marvin Goldman	- Moses Cone Hospital
Dr. John Watson	- Moses Cone Hospital

Mr. John Ward opened the meeting by reading Article 2, Paragraph 2.2.8 of the General Conditions and stating that this would also apply to J. N. Pease Associates. The following items were then discussed:

1. The letter from Mr. D. W. Watson of the Division of

Facility Services requesting that future payments to Mercury until the liquidated damages claimed by the Department of Health, Education and Welfare have been paid. Bobby Head said this would be taken care of, probably today.* Mr. Ward said not to let this hold up payments and that we could not recommend payment until it had been cleared.

2. The retainage and punch list was discussed. Mr. Beck said there may be ten items left on the list and that the total value would not be over $300. He said that the lavatory had not been moved and the dressing cubicle installed in radiology and that the Hospital may want a sink relocated to the special procedure room as an alternate to this. Rubber flooring needs to be replaced in some areas, and some seams are coming loose. The largest area is the emergency lobby. Mr. Byrd, Mr. Beck, and Dr. Watson are to arrive at a value for the punch list items that have not been completed, then this will be doubled and that amount withheld from the retainage.
3. Extended overhead and impact cost were discussed. Mr. Ward stated that overhead should have been included in the project bid for the days that are a part of the contract and that he has no knowledge of impact cost. He asked that the Contractor say at this meeting that extended overhead would not be applied to items at this time. Mr. Head said that they would reserve their rights on extended overhead until the end of the job but that this agreement is also based on their getting their retainage.
4. Mr. Beck said the finishes in Recovery and ICU proposal letters are based on comments made in our meeting of September 15 and our walk-through the same day. Mr. Byrd said that there will be major changes in five areas. These are ICU, Recovery,

* Friday, October 7, 1977.

X-Ray, Pharmacy, and Coronary Care. He said that the most important thing right now is to approve the two proposals that we received in Charlotte on October 5, 1977. These are on the ICU and Recovery areas. Mr. Ward suggested that Mr. Hays go to Greensboro Monday and Tuesday to review these proposals on the job.

Mr. Beck said that Item 11 in his letter is still open in that they still need some details.

Mr. Ward said that our determination is that where a finish is called for the Owner has bought the finish but that we feel in some cases there was not enough information to quote properly. Mr. Beck agreed and said that they would quote on installation cost as applicable.

5. Protection of the existing X-ray equipment was discussed. Mr. Head said that they did not know that the equipment would remain, and Mr. Goldman said that it was never the Hospital's intention to move it. Mechanical boxes, ducts, etc. have to be built over this equipment and Mr. Beck said that he doesn't know any way to protect it. There are four X-ray rooms involved, and one has a free-standing unit that could be protected. The other three have ceiling-mounted tubes which would be difficult to protect. Mr. Beck said that these rooms serve as a connecting link from new to old areas and that all services feed through the ceilings of these rooms. Mr. Williams suggested that Mr. Goldman review their insurance. He said he felt that the equipment was probably covered by the extended insurance coverage for the building program. He further stated that protection of the equipment is minor and that responsibility is major. Mr. Goldman said we should still know who is responsible for damage. Mr. Ward said that we will make a determination of who is responsible and

that it will be fair. Mr. Pease said that the best people to recommend proper protection would probably be the X-ray suppliers, but Mr. Goldman said that the radiologists might be best and that at any rate he would talk to them first. He also said that the insurance carrier should be involved and that he didn't know when he would be available. Mr. Beck said that this needs to be resolved at once.

Procedure will be as follows:

a. Establish recommended method of protecting equipment (Radiologists, insurance, manufacturer, if necessary).
b. Establish financial responsibility for protection.
c. Proceed with the work in the area.

6. Mr. Head said that Mercury is preparing to quote a number of changes. These quotations will be grouped in categories and will be either accepted in the grouping or canceled.

   The first example of this grouped quoting will be those quotes relating to X-Ray (MM No. 499, 503, 536, 549, 564, 578, 588, 616, 663, 683, 684, and 383). A preliminary letter and back-up data was handed JNPA on 10/7. The quotation for X-Ray changes will be held firm until 10-21-77, and if the change is executed by that time the scan room will be ready for installation of equipment in March, 1978.

Mr. Ward thanked everyone for coming, and the meeting adjourned.

Joseph G. Hays, Jr.

JGHJr/cpb

[Handwritten marginal notes omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
C-80-585-G
(Also Filed in C-80-586-G)

THE MOSES H. CONE MEMORIAL HOSPITAL, *Plaintiff,*	)	
-vs-	)	AFFIDAVIT OF JOHN V. WARD
MERCURY CONSTRUCTION CORPORATION and J.N. PEASE ASSOCIATES, *Defendants.*	)	

Filed December 1, 1980

John V. Ward, being duly sworn, deposes and says:

1. I reside in Charlotte, North Carolina. I am employed in Charlotte by the architectural firm of J. N. Pease Associates, Inc. I am registered to practice architecture in the state of North Carolina and have been for many years. I am a member of the American Institute of Architects and have been a member for many years.

2. I was assigned as Principal in Charge of the work which Pease performed under its contract with the Moses H. Cone Memorial Hospital relating to certain renovations and additions to the Hospital, replacing the original Principal in Charge during a portion of the construction phase. By the terms of the construction contract between the Hospital and Mercury Construction Corporation, which the Pease firm (hereinafter called the Architect) prepared in consultation with the Hospital, communications between the Hospital and Mercury were supposed to be handled through the architect as the Owner's representative.

3. Prior to October 7, 1977, Mercury had submitted both orally and in writing certain claims for extended overhead and impact costs in addition to the cost of labor and materials involved in performing change order work. At a meeting held in the architect's office in Charlotte, I requested that Mercury defer submittal and consideration of any extended overhead and impact cost claims that it then had or might have in the future until the time period just prior to the Contractor's preparation of application for final payment. Bobby Head of Mercury agreed to do that provided that Mercury's rights would be reserved. Both Marvin Goldman and John Watson were present during this discussion and neither of them objected then or at any later time to the agreement reached at the meeting. My colleague, Joe Hays, prepared notes of the October 7 meeting which do not incorporate all of the discussion on this matter, but which accurately reflect the substance of what transpired. Copies of Joe's notes were sent to the Hospital and to Dr. Watson. In my professional opinion, the actions that I took at that meeting were fully consistent with the contract between Mercury and the Hospital.

4. During the course of the project, Mercury both orally and in writing complained that it was being damaged by numerous actions and inactions for which the Owner, in my opinion, bears responsibility, including but not limited to:

(a) The Owner's failure, within a reasonable length of time, to accept for occupancy areas which the Architect had certified to be substantially complete;

(b) The Owner's failure, within a reasonable length of time, to vacate or fully to vacate areas needed by Mercury for its work;

(c) Delay in making decisions regarding the Hospital's equipment purchases, which delay in turn prevented final completion of the design of certain key areas;

(d) Delay in signing field change authorizations and

change orders.

The matters raised by Mercury in its claim for an equitable adjustment to its contract are in essence the same matters about which Mercury complained during the course of the work.

5. As to the matters contained in Mercury's claim for an equitable adjustment, I am not aware that any of them were the subject of an architect's decision, as that term is used in Article 2 of the General Conditions of the contract, prior to September 30, 1980. On that date, the Architect, in a written decision signed by me, decided that the Hospital owed Mercury between $612,692 and $1,246,368 (based on unit values furnished by Mercury) in additional compensation. In my opinion, both the substance of the decision and the procedure by which it was arrived at are fully consistent with the contract documents.

John V. Ward

[Notarization Omitted]

LIST OF RELEVANT MATERIALS PREVIOUSLY PRINTED IN APPENDIX TO CERTIORARI PETITION

	Certiorari Appendix Page
Order of Remand of the District Court, dated December 24, 1980 (attached to Mercury Petition for Mandamus as Exhibit K)	A37
Memorandum Opinion of the District Court, dated December 24, 1980 (attached to Mercury Petition for Mandamus as Exhibit M)	A33
Order of Stay of the District Court, dated December 24, 1980	A38
Notice of Appeal, dated January 7, 1981	A41
Statement of Issues to be Presented on Appeal, dated January 14, 1981	A46
Response to Motion to Dismiss Appeal, dated February 2, 1981	A43
Order of the Court of Appeals Setting Argument on Petition for Mandamus, dated February 6, 1981	A39
Order of the Court of Appeals Directing Submission of Simultaneous Briefs, dated February 12, 1981	A40
Opinion of the Court of Appeals, sitting en banc, with Dissents, dated August 12, 1981	A1
Opinion and Order of the Court of Appeals Denying Petition for Rehearing, with Dissent, dated November 24, 1981	A29
28 U.S.C. § 1292	A47
9 U.S.C. § 4	A47

Opposition

Office - Supreme Court, U.S.
FILED
JAN 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1203

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE MOSES H. CONE MEMORIAL HOSPITAL,
Petitioner

v.

MERCURY CONSTRUCTION CORPORATION,
Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

A. H. Gaede, Jr.
BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
Telephone (205) 252-4500
Attorney for Respondent

Of Counsel:
Stanley D. Bynum
Joseph B. Mays, Jr.

QUESTIONS PRESENTED

1. Did the Court of Appeals commit error in directing the district court to rule on a petition to compel arbitration under the Federal Arbitration Act, rather than allowing the district court to stay the action before it and defer to a state court to decide that federal policy issue following remand of a related action pending in the district court?

2. Did the Court of Appeals commit error by holding that a district court order staying action on a timely filed petition to compel arbitration under the Federal Arbitration Act in order to allow a state court to render a final judgment on that same issue was directly appealable under 28 U.S.C. §1291?

3. Should this Court grant certiorari to allow a party which has fully briefed and argued all material issues on several occasions in the district court and Court of Appeals a further opportunity to deal with those same issues?

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v.

MERCURY CONSTRUCTION CORPORATION,
Respondent

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent, Mercury Construction Corporation, respectfully prays that the Court deny petitioner's request for a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Fourth Circuit entered on August 12, 1981.

OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit is reported at 656 F.2d 933 (4th Cir. 1981). The unreported Memorandum Opinion of the District Court for the Middle District of North Carolina appears in the Appendix to petitioner's Petition for Certiorari (A. 33).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 12, 1981. A petition for rehearing was denied on November 24, 1981. Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

9. U.S.C. § 4. Failure to arbitrate under agreement.
Text set forth in Appendix to Petition (A 47)

28 U.S.C. § 1291. Final decisions of district courts.
The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292. Interlocutory decisions.
Text set forth in Appendix to Petition (A 47)

STATEMENT OF THE CASE

Mercury Construction Corporation (hereafter "Mercury") is a Delaware corporation with its principal place of business in Montgomery, Alabama. In July, 1975, Mercury was awarded a contract by the Moses H. Cone Memorial Hospital of Greensboro, North Carolina (hereafter the "Hospital") to perform certain renovations and additions. The contract was drafted *unilaterally* by the Hospital and contained a clause requiring the arbitration of all claims or disputes in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. (A2)

Mercury began construction in July, 1975. In October, 1977, while the work was in progress, the Hospital requested that Mercury hold all claims for delay and impact costs until after the work was completed, and Mercury agreed to do so. (A3) With the exception of punch list and warranty work, Mercury completed the contract work in 1979. Warranty work continued into 1980. (A3) In January, 1980 Mercury submitted its claims to the architect, J. N. Pease Associates (hereafter "Architect"), designated as the Hospital's representative by the contract. (A3) In May, 1980 counsel for the Hospital expressed to counsel for Mercury a desire to settle Mercury's claims, and the parties and their counsel met in Montgomery, Alabama for that purpose in August, 1980. At the conclusion of that meeting, Mercury agreed to supply additional information requested by the Hospital and to allow the Hospital's expert to examine Mercury's records. The parties scheduled a second settlement conference for October 13, 1980. (A4)

On October 7, 1980, one week before the scheduled settlement conference, counsel for Mercury telephoned counsel for the Hospital to confirm the date of the conference. On the following day, counsel for the Hospital advised counsel for Mercury that the Hospital was filing suit that day in state court. (A4) This was the first occasion that counsel for Mercury had any notice that the Hospital would resist arbitration.[1] That suit, filed on October 8, 1980 against both Mercury and the Architect, claimed no damages from Mercury. Instead, the Hospital, in a complaint which did not even mention the Federal Arbitration Act, 9 U.S.C. §§1-9, sought a jury trial and a declaratory judgment that it was not obligated to arbitrate and that it owed Mercury noth-

[1]Until that moment, Mercury had no basis for filing a petition to compel arbitration in the United States District Court because 9 U.S.C. §4 requires a "failure, refusal or neglect" to arbitrate as a jurisdictional prerequisite.

ing. Alternatively, the Hospital sought indemnification from the Architect for any sums found owing to Mercury. (A5) The Architect was not a party to Mercury's contract with the Hospital and Mercury was not a party to the Hospital's contract with the Architect.

The following day Mercury filed an arbitration demand with the American Arbitration Association. Before Mercury was able to file a petition to compel arbitration in federal court, without notice to Mercury, the Hospital obtained on October 15 an *ex parte* injunction from the state court barring Mercury from taking any action directed toward arbitration. (A5) This order was clearly violative of this Court's decisions in *Donovan v. City of Dallas,* 377 U.S. 408 (1964) and *General Atomic Co. v. Felter,* 434 U.S. 12 (1977). In deference to the state judiciary, Mercury did not file a petition in federal court, but instead moved the state court to vacate its order on the basis of the Federal Arbitration Act, 9 U.S.C. §§1-9, and the decisions mentioned above. (A6) The state court lifted its injunction on the morning of October 27 and Mercury that afternoon filed in the United States District Court for the Middle District of North Carolina a removal petition based on 28 U.S.C. §1441 (c) and, in a separate action, a petition to compel arbitration under Section Four of the Federal Arbitration Act, 9 U.S.C. §4.

Both parties filed in district court extensive briefs, affidavits and exhibits on the merits of the issue of arbitrability. No such materials had been filed by either party in state court. In addition, the Hospital filed a motion to remand the removed action and a motion requesting the district court to stay proceedings on Mercury's petition to compel arbitration. (A6)

At the time the district court heard the motions, there was no action pending in state court, all parties necessary

for adjudication of the arbitrability issue were before the district court, and the arbitrability issue had been extensively briefed on the merits. Nevertheless, the district court heard arguments and ruled solely on the Hospital's motions. The district court ruled on December 24 that the removed action was due to be remanded to state court[2] and indefinitely stayed proceedings on Mercury petition to compel arbitration, pending a resolution of the remanded proceeding in state court. The only basis stated for the district court's stay order was that the identical issue of arbitrability of Mercury's claims was involved in the state court action. The only authority cited supporting the order was *E. C. Ernst Inc. v. Potlatch Corp.*, 462 F.Supp. 694 (S.D. N.Y. 1978) which, as the court rendering that decision admitted, is unique in American jurisprudence. (A6)

Mercury thereupon filed a petition with the Court of Appeals for the Fourth Circuit seeking a writ of mandamus requiring the district court to vacate the stay order and to rule on Mercury's petition to compel arbitration. Alternatively, Mercury filed notice of appeal, which the Hospital moved to dismiss. (A6) A Fourth Circuit panel heard argument from both parties on February 12, 1981 and requested that the parties submit simultaneous briefs. Both parties filed extensive briefs, and on June 1, 1981, at the direction of the Court of Appeals, an en banc rehearing was held in which all issues were again fully argued by both parties. The Court of Appeals issued its opinion on August 12, 1981 and denied the Hospital's petition for rehearing on November 24, 1981.[3]

In its opinion, the Court of Appeals found that Mercury was entitled to appeal the district court's order, and thus

[2]Mercury feels that the remand was erroneous but concedes that this ruling is not reviewable.

[3]By agreement of the parties, no further proceedings have occurred in the state court since January, 1981.

treated the proceeding as an appeal rather than as a mandamus proceeding. On the basis of undisputed facts in the record, the Court of Appeals held that Mercury was entitled to an order directing arbitration of its claims against the Hospital. The court further held, citing the decisions of this Court in *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976) and *Will v. Calvert,* 437 U.S. 655 (1978) that the district court had erred in staying proceedings on Mercury's petition to compel arbitration. The case was thus remanded to the district court, and the Hospital sought review by this Court.

REASONS FOR DENYING THE WRIT

1. The opinion of the Court of Appeals for the Fourth Circuit correctly required the district court to entertain a petition to compel arbitration pursuant to Section Four of the Federal Arbitration Act.

Petitioner argues that the order of the Court of Appeals reversing the district court's stay order is in direct conflict with this Court's decision in *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976). Petitioner's argument is based on a misunderstanding of *Colorado River,* a case which clearly supports the Court of Appeals' holding that the district court erred in staying a proceeding to compel arbitration pending the outcome of the state court action. Indeed, the Court of Appeals expressly measured the action of the district court against the rule of *Colorado River* and correctly found the district court to be in error.

In *Colorado River* this Court stressed that federal courts have a duty to decide cases properly before them, and that abstention is justified only in rare cases.

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of ab-

> stention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in exceptional circumstances where the order to the parties to repair to State Court would clearly serve an important countervailing interest."

424 U.S. at 813, citing *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959). This Court thus recognized that the pendency of an action in a state court is no bar to proceedings concerning the same matter in a federal court having jurisdiction, and spoke of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." 424 U.S. at 817.

In *Colorado River* this Court confined the circumstances appropriate for abstention to three general categories:

> (a) Cases presenting a federal constitutional issue which might be mooted or presented in a different posture by state court determinations of pertinent state law;
>
> (b) Cases presenting difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar;
>
> (c) Cases where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining a state criminal proceeding.

424 U.S. at 814-17. Clearly, none of these categories of cases are applicable in the present case, and petitioner has not so argued.

This Court in *Colorado River* noted that, even in cases not falling into one of the three categories, abstention could be justified in certain exceptional and highly unusual cir-

cumstances. This Court found such a circumstance in *Colorado River* because the McCarran Amendment, a federal statute which this Court held demonstrated a Congressional intention to avoid peacemeal litigation of water rights in a river system, evidenced a federal policy to allow adjudication of such controversies within the state court systems. Such an unusual circumstance favoring state court adjudication is *not* present in the instant case. In fact, the federal policy involved in the instant case is the "unmistakably clear Congressional purpose that the arbitration procedure, where selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). Mercury merely asked the district court, whose jurisdiction over the parties was not disputed, to enforce Congressionally granted rights under the Federal Arbitration Act. Congress in that statute clearly evidenced the intention that federal courts act quickly to enforce the federally protected right to arbitrate. The federal courts have been the appropriate forum for the assertion of arbitration rights, and the actions of the Hospital in rushing to the state court, first in an effort to avoid arbitration and then to avoid an adjudication in a federal court on the issue of arbitrability do not establish the exceptional circumstances necessary for the federal courts to abstain.

Petitioner states that the Court of Appeals held that the district court had no discretion to stay its proceedings pending the outcome of the state court action, and thus argues that the Fourth Circuit's opinion conflicts with Justice Rehnquist's plurality opinion in *Will v. Calvert*, 437 U.S. 655 (1978). This is false conflict, based on petitioner's misreading of *Will* and of the holding of the Court of Appeals. In *Will*, a district court stayed proceedings in a suit for violation of Rule 10b-5 under Section 10 (b) of the

Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), because substantially similar proceedings had been commenced almost six months earlier in state court. The Seventh Circuit granted a petition for mandamus, ordering Judge Will to dissolve the stay and adjudicate the Exchange Act claims. Justice Rehnquist, joined by three other justices, argued that under *Colorado River* the decision whether to stay was a matter committed to the district court's discretion, and urged that a discretionary decision should not be overturned by a writ of mandamus absent a clear showing of abuse of discretion. 437 U.S. 665. Four justices dissented, arguing that mandamus was proper in this situation, and Justice Blackmun, in a separate opinion, voted to return the case to the district court for reconsideration in light of the recently announced decision in *Colorado River*. The present case presents no conflict with the plurality opinion in *Will*. Presented both with an appeal and a petition for mandamus, the Court of Appeals expressly chose to consider the matter as an appeal rather than as a mandamus action. (A6) Therefore the more stringent standard for review of the district judge's discretion urged by Justice Rehnquist does not apply in this case. Furthermore, the Court of Appeals does not hold, as petitioner suggests, that the district judge lacked discretion to enter a stay. (Petition, p. 6) On the contrary, the Court of Appeals carefully considered the facts in the record in light of this Court's holding in *Colorado River*, and held that there were no exceptional circumstances in the record justifying a stay, and that the district court had therefore erred in imposing one.

2. The Court of Appeals was correct in treating the district court's stay order as an appealable final order.

Although Mercury sought review of the district court's order both by appeal and alternatively by mandamus, and although Mercury contends that review by mandamus should produce the same disposition of the lower court's order, the Court of Appeals expressly recognized the order as appealable and treated the proceeding as an appeal. (A6) The court's holding in that regard was based primarily on its earlier opinion in *Amdur v. Lizars*, 327 F.2d 103 (4th Cir. 1967) and on similar cases from other circuits. (A6) In *Amdur* the Court of Appeals recognized that although in the usual case a stay order is not an appealable order, if it is equivalent to a dismissal of the proceedings that order can properly be treated as final and thus appealable under 28 U.S.C. § 1291. 327 F.2d at 105-06.

The stay order entered by the district court had the effect of finality. In granting the motion to stay, the district court postponed ruling on Mercury's petition to compel arbitration until the state court had ruled on the arbitrability issue. Once the state court had ruled, its ruling would have *res judicata* effect in the district court and nothing would be left for the district court to decide. The district court's order thus had the effect of depriving Mercury of the federal forum that Congress provided for adjudication of its petition to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 4, and of defeating the Congressional policy, evidenced by the Act, of giving the parties a quick resolution of their dispute over arbitrability. Here, as in *Amdur*, the stay order had the practical effect of a dismissal of the district court action, and the Fourth Circuit properly treated the order as appealable.

Petitioner argues that the decision of the Court of Appeals to treat the district court order as appealable conflicts

with decisions from other circuits and from this Court. However, a review of the decisions cited by petitioner shows that they are factually dissimilar and no real conflict can be said to exist. In *Colter v. Inter-County Orthopaedic Association*, 526 F.2d 537 (3rd Cir. 1975), the appellate court recognized that the district court's stay order did *not* have the effect of terminating the proceedings and expressly distinguished that factual situation from one present in *Amdur*, 526 F.2d at 540. In *Jensenius v. Texaco, Inc.*, 639 F.2d 1342 (5th Cir. 1981), the district court stayed an action for seaman's pension benefits and wages under 46 U.S.C. § 596 pending a resolution of a state court action against plaintiff's employer for damages based on the employer's alleged breach of a labor agreement. 639 F.2d at 1343. These were clearly separate controversies and the district court stay order amounted to a postponement, rather than a dismissal, of the federal action. And in *State Farm Mutual Automobile Insurance Company v. Scholes*, 601 F.2d 1151 (10th Cir. 1979), the Tenth Circuit, while recognizing that other courts had found stay orders appealable in appropriate circumstances, elected to treat an appeal of the dismissal without prejudice of a declaratory judgment action as a petition for mandamus instead. 601 F.2d at 1151-52. In none of these cases upon which petitioner relies was a party's effort to assert federally protected rights in the federal courts stayed in deference to a state court proceeding as in the present case. In short, the "conflict" which petitioner claims to find among the circuits on the issue of appealability of a stay order is in reality a recognition in each case that such an order is appealable when it has the effect of finality, and that determination depends on a factual evaluation in every case.

Nor does the Fourth Circuit's decision that the stay order is appealable conflict with recent decisions of this Court, as petitioner suggests. In *Coopers & Lybrand v. Livesay*,

437 U.S. 463 (1978) this Court held that an order denying class certification was not appealable as a matter of right. The Court thus rejected the "death knell" doctrine with respect to such orders, because that doctrine relies on considerations of economic impact rather than legal finality, and because the ability of individual plaintiffs to pursue their claims after a denial of class certification defeats finality. Such considerations are not relevant in the present case. In *Firestone Tire & Rubber Co. v. Risjord*, ___ U.S. ___, 101 S.Ct. 669 (1981), also relied upon by petitioner, this Court held that an order denying a motion to disqualify counsel — clearly not a final order which would have the effect of terminating the litigation — was not appealable under the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In the present case, however, the Court of Appeals recognized that the district court's order had the practical effect of terminating the proceeding in the district court, and thus allowed the order to be appealed, not under the "collateral order" doctrine, but as an effectively final order.

This Court has recognized that the finality requirement of 28 U.S.C. § 1291 is to be given a practical rather than a technical construction. *Cohen, supra,* at 546. The Court of Appeals correctly recognized the practical finality of the stay order under the facts of this case. That recognition conflicts neither with the decisions from other circuits cited by petitioner nor with the recent decisions of this Court.

3. The Court of Appeals Afforded Petitioner Ample Opportunity to be Heard on the Merits.

Petitioner argues that the Court of Appeals required the parties to follow a "tortured procedural path" and "so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power

of supervision." (Petition, p. 15) This argument is unjustified and not supportable. Petitioner had ample opportunity to express its views at every stage below, and apparently raises alleged procedural irregularities now only because it is dissatisfied with the Court of Appeals' decision on the merits.

A brief history of the proceeding before the Court of Appeals is instructive. The Court of Appeals first requested the parties to argue before a three-judge panel and, following that argument, requested simultaneous briefs. Petitioner submitted a brief which fully dealt with all issues involved in the case. Moreover, the Court of Appeals had the benefit of the extensive briefs, affidavits, and exhibits filed by both parties in the district court and made a part of the record before the Court of Appeals. The parties then were requested to return for an en banc rehearing, at which all issues of the case were again fully argued and in which petitioner had ample opportunity to respond to any point raised in Mercury's brief. Petitioner has presented its views to the Court of Appeals in an extensive brief which addresses all issues, in two oral arguments, and in a subsequent extensive and detailed petition for rehearing. Petitioner's argument that it has been denied an opportunity to be heard on the merits strains credibility.

The sole authority cited by Petitioner in support of its position, *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1971) is clearly inapposite. In *Beazer*, the district court held an employer's blanket refusal to hire methadone users unconstitutional on equal protection grounds. Almost a year later, the district court entered a subsequent opinion allowing recovery of attorney's fees under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (k), an issue not raised earlier. The Court of Appeals for the Second Circuit affirmed the district court's ruling on the constitu-

tional issue, declined to consider the award of fees under Title VII, and sustained a fee award under the subsequently passed Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. *Beazer v. New York Transit Authority*, 538 F.2d 97 (2d Cir. 1977). This Court, on review, noted its concern over the departure by the courts below from procedure normally followed in addressing constitutional and statutory issues in the same case, as well as concern that the lower court's decision on the merits of the constitutional question was erroneous. 440 U.S. at 570-71.

In contrast to the situation presented in *Beazer*, there has been no bifurcation of constitutional and statutory adjudication in this case, and there has been no ruling based on a statute enacted after the lawsuit was commenced. Both parties had ample opportunities to brief and to argue the issues involved, at both the district court and the appellate levels. In light of all these circumstances, Petitioner has certainly not been deprived of an opportunity to be heard in this action.

CONCLUSION

The contract between the Hospital and Mercury, drafted by the Hospital, clearly calls for arbitration of disputes between the parties, yet at every step in these proceedings the Hospital has sought to evade its obligation to arbitrate and to frustrate Mercury's attempts to compel arbitration. This Court has recognized the "unmistakeably clear Congressional purpose that the arbitration procedure, where selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). The Court of Appeals, in a well-reasoned decision, gave effect to that policy by reversing the district court's stay order. This case has already been entangled in the courts,

unnecessarily, for well over a year. Respondent respectfully submits that no error in the decision of the Court of Appeals warrants review by this Court, and that certiorari should be denied.

Respectfully submitted,

A. H. Gaede, Jr.
BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
Telephone (205) 252-4500
Attorney for Respondent

Of Counsel:
Stanley D. Bynum
Joseph B. Mays, Jr.

Petitioner's Brief

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No. 81-1203

IN THE

Supreme Court of the United States

October Term, 1981

THE MOSES H. CONE MEMORIAL HOSPITAL,
Petitioner

v.

MERCURY CONSTRUCTION CORPORATION,
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONER

Jack W. Floyd
SMITH MOORE SMITH SCHELL & HUNTER
Post Office Box 21927
Greensboro, North Carolina 27420
(919) 378-1450
Attorney for Petitioner

OF COUNSEL:

Stephen P. Millikin
Douglas W. Ey, Jr.

QUESTIONS PRESENTED

1. Does a district court have discretion to stay its proceedings in a diversity case pending resolution of identical issues by a state court having concurrent jurisdiction in a prior civil action that includes all necessary parties to the underlying disputes?

2. Is an order staying proceedings in a district court pending resolution of a prior state court action appealable under 28 U.S.C. § 1291?

3. Should this Court exercise its supervisory powers to reverse the judgment of the court of appeals and to reinstate the order of the district court when the court of appeals departs from the usual and accepted course of judicial proceedings by deciding as an appeal a case addressed procedurally as a writ of mandamus and by adjudicating substantive matters not ripe for appellate determination?

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BRIEF OF PETITIONER

OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit is reported as *In re Mercury Construction Corp.*, 656 F.2d 933 (4th Cir. 1981). (Cert. App. A1) The order and opinions of the Fourth Circuit denying rehearing are reported as *In re Mercury Construction Corp.*, 664 F.2d 936 (4th Cir. 1981). (Cert. App. A29) The unreported Memorandum Opinion of the District Court for the Middle District of North Carolina appears in the appendix to the petition for certiorari. (Cert. App. A33)

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 12, 1981. The petition for rehearing was denied on November 24, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The petition for certiorari was docketed on December 28, 1981, and certiorari was granted on February 22, 1982.

STATUTORY PROVISIONS

9 U.S.C. § 4. Failure to arbitrate under agreement.

Text set forth in certiorari appendix. (Cert. App. A47)

28 U.S.C. § 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292. Interlocutory decisions.

Text set forth in certiorari appendix. (Cert. App. A47)

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603 (a) of this title, as plaintiff and citizens of a State or of different States.

. . . .

STATEMENT OF THE CASE

This litigation consists of a civil action filed by petitioner, The Moses H. Cone Memorial Hospital (Hospital), in the Superior Court of Guilford County, North Carolina, and a second civil action subsequently filed by respondent, Mercury Construction Corporation (Mercury), in the United States District Court for the Middle District of North Carolina. The underlying disputes involve the three principal participants in a construction and renovation project: Hospital (owner), Mercury (prime contractor) and J. N. Pease Associates (architect).

In 1969, Hospital contracted with Pease for the provision of architectural design and supervisory services in renovating and adding to the Hospital facility. (J. App. 18) In 1975, Hospital contracted with Mercury for the performance of all work required by the contract documents for these additions and alterations. (J.App. 19) The General Conditions of the contract between Mercury and Hospital included a comprehensive mechanism for the resolution of claims and disputes arising during the execution and progress of construction. In order to expedite completion of the project, Hospital and Mercury agreed that Pease, the architect, would serve as a judge during construction to resolve claims and disputes between Mercury and Hospital "relating to the execution or progress of the Work or the interpretation of the Contract Documents." (General Conditions ¶ 2.2.7, J.App. 28)

To insure that the work would not be slowed by disputes and claims arising during the progress of the work, the contract required that they be resolved as they arose, and provided for submission of disputes to the architect during construction "in the first instance." (General Conditions ¶ 2.2.6, J.App. 28) Reference of claims to the architect for resolution during construction was a condition precedent to the right to arbitrate. The parties invoked this procedure and arbitrated disputes while construction proceeded, as the

contract required. (Exhibits 1-13 to D. Barry Affidavit No. 4, filed November 17, 1980) Long after completion of construction, and after the architect's power to act as a judge in the first instance had terminated, Mercury requested Hospital to pay for delay damages that allegedly had accumulated during four years of construction. (J.App. 20)

On October 8, 1980, after concluding that Mercury's claims were without merit, Hospital filed a declaratory judgment action in state court against Mercury and Pease requesting a determination of the rights and obligations of the parties under the relevant contracts. Hospital asked the state court to declare that Mercury had no valid damages claim against Hospital under the contract. (J.App. 26) Hospital further alleged that both Mercury and Pease had breached their contracts with Hospital in several respects and that both were responsible for any delay damages suffered by Mercury. (J.App. 21-26) Hospital also sought a declaration that the claims asserted by Mercury were not subject to arbitration. (J.App. 24-26)

On October 27, 1980, Mercury simultaneously removed the state court action to federal district court and filed in that court a petition seeking an order compelling arbitration under 9 U.S.C. § 4, a provision of the Federal Arbitration Act. (J.App. 4) Mercury asserted jurisdiction of the district court under 28 U.S.C. § 1332 on the grounds of diversity of citizenship. (J.App. 4) Diversity existed between Hospital and Mercury, but not between Hospital and Pease.[1] Mercury contended that removal of the declaratory judgment action was proper under 28 U.S.C. § 1441 (c) because Hospital asserted "separate and independent" claims against Pease and Mercury. The district court rejected that contention and ordered remand on December 24, 1980, finding that the declaratory judgment action involved a " 'single wrong . . . arising from an interlocked series of transactions.' " (Cert.

[1] Mercury is a Delaware corporation with its principal place of business in Alabama. Hospital is a North Carolina nonprofit corporation and Pease is a North Carolina corporation. (J.App. 17)

App. A35) The district court then granted Hospital's motion to stay further proceedings on Mercury's petition to compel arbitration pending resolution of the state declaratory judgment action, which raised the identical arbitrability issue. The district court expressly relied on *E. C. Ernst, Inc. v. Potlatch Corp.*, 462 F. Supp. 694 (S.D.N.Y. 1978), a case directly on point, and did not reach the merits of the arbitrability question. (Cert. App. A38)

On January 6, 1981, Hospital filed a motion for summary judgment in the state declaratory judgment action, and asked for a hearing on this and all other pending motions during the week of February 9, 1981. On January 12, 1981, Mercury filed a petition in the United States Court of Appeals for the Fourth Circuit seeking a writ of mandamus requiring the district court to vacate its stay order and to rule on Mercury's petition to compel arbitration. (J.App. 11) Alternatively, Mercury requested that its petition be treated as a notice of appeal, "should [the Fourth Circuit] determine that mandamus will not lie." (J.App. 11) Mercury expressly stated that it chose to pursue the alternative appeal only under 28 U.S.C. § 1291, and not pursuant to any subsection of 28 U.S.C. § 1292. (Cert. App. A44 n. 1) Hospital moved to dismiss the alternative appeal on January 26, 1981.

The court of appeals on February 5, 1981 ordered that a hearing be held only on Mercury's application for mandamus before a three-judge panel on February 12, 1981. Hospital, though never having been permitted to respond to the petition or file a brief, was granted leave to appear at the hearing. [2]

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[2] Federal Rule of Appellate Procedure 21(b) does not permit a response to a mandamus petition without an order of the court of appeals authorizing it and fixing the time within which it shall be filed. The Fourth Circuit issued no authorizing order. Rule 21(b) states, in pertinent part: "If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court."

(Cert. App. A39) The parties agreed that the case in the state court would not be heard during the week of February 9, 1981, pending the outcome of the Fourth Circuit hearing that same week. After the hearing on the petition for writ of mandamus, the panel directed the parties to submit simultaneous briefs within ten days. (Cert. App. A40) The three-judge panel never rendered a decision or filed an opinion. An en banc rehearing on Mercury's mandamus petition was held on June 1, 1981. On August 12, 1981, the Fourth Circuit filed an en banc opinion written by Judge Russell. *In re Mercury Construction Corp.*, 656 F.2d 933 (4th Cir. 1981). Judges Hall and Widener dissented. [3]

The Fourth Circuit majority reversed and remanded the case to the district court for proceedings "in conformity herewith." 656 F.2d at 946. The majority chose not to rule on the mandamus petition, but found that Mercury was entitled to a direct appeal. *Id.* at 937-38. The majority then determined that under the Federal Arbitration Act Mercury had a "plain, indisputable right" to arbitration of its claims against the Hospital. *Id.* at 942. Finally, the majority assessed the propriety of the district court's stay order in light of the opinions of this Court in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978). The majority found that Justice Blackmun's concurring opinion in *Will* controlled, and concluded that the district court's stay order was improper. 656 F.2d at 943-46. Hospital's petition for rehearing was denied, with an opinion and a dissent accompanying the order. *In re Mercury Construction Corp.*, 664 F.2d 936 (4th Cir. 1981). Hospital's petition for certiorari was granted on February 22, 1982.

SUMMARY OF ARGUMENT

The district courts have the inherent discretionary power to stay proceedings for reasons of comity, efficiency and

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[3] The original three-judge panel, which rendered no decision or opinion, was composed of Judges Russell, Hall and Widener.

wise judicial administration. The exercise of this discretion by the district court in this case was appropriate and desirable because the state court had assumed jurisdiction over a civil action involving identical issues prior to the filing of the federal action. All issues arising under the Federal Arbitration Act were subject to the concurrent jurisdiction of the state and federal courts. Moreover, only the state court had before it all necessary parties to the underlying disputes.

In deciding whether to stay, the district courts must have discretion to consider a wide variety of factors. By reversing the stay order on direct appeal, the Fourth Circuit substituted its judgment for that of the district court, usurping the district court's discretionary authority to control its docket. The loss of this discretion undermines the independence of the district judges and impairs efficient implementation of judicial resources. This Court's decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) in no way inhibited the district court's authority to stay. If, as the Fourth Circuit holds, *Colorado River* prescribes a strict "exceptional circumstances" standard, its application should be limited to its facts — dismissal.

By staying the proceedings, the district court exercised jurisdiction over the action and remained free to reconsider the stay at any time. The stay was not a "final decision" on the merits. Review of the stay on appeal under 28 U.S.C. § 1291 was improper. Congress limited appellate jurisdiction to final decisions on the merits in order to prevent inefficiency in both the trial and appellate divisions of the federal courts. By exercising this power, Congress prohibited the courts of appeals from fashioning case-by-case exceptions to the finality rule. The Fourth Circuit's adoption of an "effective finality" exception improperly extends its jurisdiction. Development of additional exceptions to the finality requirement disrupts the efficient administration of justice.

Uncertainty and inefficiency are inevitable products of case-by-case extension of appellate jurisdiction. In the instant case uncertainty was compounded by the procedure in which

appeal under § 1291 was pursued alternative to mandamus. Not until the issuance of the Fourth Circuit opinion were the parties informed of the standard of review being applied. The course of proceedings in the court of appeals completely misled the litigants as to the nature of the matters under review. By deciding the merits of the case on appeal when the only question properly before the court was whether mandamus should issue vacating the stay, the court of appeals deprived the litigants of the right to a hearing and a jury determination provided by the Federal Arbitration Act. In this case, the parties briefed and argued mandamus and appealability. The court of appeals decided the merits on appeal without evidence, argument or briefs. This anomalous result is directly attributable to the mandamus / alternative appeal procedure, which should be condemned by this Court.

In order to preserve and enhance the discretion of the district courts to manage their dockets effectively and to restore certainty at the appellate level, the Court should reverse the judgment of the court of appeals and reinstate the stay order.

ARGUMENT

I. A FEDERAL DISTRICT COURT HAS DISCRETION TO STAY PROCEEDINGS IN A DIVERSITY CASE PENDING COMPREHENSIVE RESOLUTION OF IDENTICAL ISSUES IN A STATE COURT HAVING CONCURRENT JURISDICTION OVER A PRIOR CIVIL ACTION.

A. The Inherent Discretion to Stay

The judicial action giving rise to the questions before this Court is the order of the district court staying proceedings before it pending resolution of the identical issue in a prior state court action. The entry of the stay by the district court was an appropriate exercise of its inherent discretionary

power to manage its docket efficiently and to provide for the effective and comprehensive resolution of disputes. The existence of this discretionary authority has been confirmed repeatedly by this Court.

In *Landis v. North American Co.*, 299 U.S. 248 (1936), the district court entered an order staying consideration of plaintiffs' challenge to the constitutionality of a federal statute, reasoning that decisions in other pending federal cases would narrow the issues and assist in determining questions of law.[4] 299 U.S. at 253. Even though plaintiffs in the stayed actions were not parties to the other pending cases, the Supreme Court held that the district court was empowered to enter the stay order:

> [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.
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> *Id.* at 254-55.

The Court refused to adopt a "mechanical and narrow" formula, cautioning that "[w]e must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions." *Id.* at 255-56. *Landis* identified the source of the discretionary power to stay. It does not arise from any statute or rule of procedure; rather, the power to enter a stay order is an *inherent* power possessed by every court, permitting effective and efficient management of cases.

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[4] Plaintiffs sued members of the executive branch of the federal government to enjoin enforcement of a federal statute, contending that it was unconstitutional as applied to plaintiffs. Several other plaintiffs had filed similar suits in other federal district courts making the same allegations in somewhat different factual contexts. 299 U.S. at 249-50.

In *Brillhart v. Excess Insurance Co.*, 316 U.S. 491 (1942), the Court held that a district court had discretion to dismiss a declaratory judgment action when identical issues were raised in a prior state court proceeding. The Court did not attempt a "comprehensive enumeration" of the factors relevant to the exercise of this discretion by the district court, but it recognized that "[g]ratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." 316 U.S. at 495.

By approving the entry of a final dismissal order in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), the Court demonstrated that the rationale of *Landis* was not limited to parallel federal proceedings and that the holding of *Brillhart* applied beyond the context of declaratory judgment actions. In *Colorado River*, the government invoked the jurisdiction of the district court under 28 U.S.C. § 1345 in a suit seeking a determination of the government's water rights. Subsequently, the government was added as a party to state proceedings which adjudicated water rights. Applying the abstention doctrine, the district court dismissed the government's complaint. 424 U.S. 805-06. This Court held dismissal proper, though not on abstention grounds.

The Court first determined that the state courts had concurrent jurisdiction over controversies involving federal rights to the use of water, finding that "[t]here is no irreconcilability in the existence of concurrent state and federal jurisdiction. Such concurrency has, for example, long existed under federal diversity jurisdiction." *Id.* at 809. A state court's decisions on any aspect of federal law or federal rights were subject to review by the Supreme Court to insure uniformity.[5] *Id.* at 812-813.

[5] The government argued that state court jurisdiction over Indian property rights should not be recognized unless expressly conferred by Congress because of the government's fiduciary responsibility to protect Indian rights. The Court rejected this argument, finding that it rested on the "incorrect assumption" that state court jurisdiction imperiled Indian water rights. 424 U.S. at 812-13.

Based on fundamental considerations of " '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,' " *Colorado River* prescribed factors to be assessed by the district court in the exercise of its discretion to dismiss in deference to parallel state court proceedings. *Id.* at 817. The enumerated factors, none of which is "necessarily determinative," were the inconvenience of a federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums. *Id.* at 818. The Court concluded that "a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." *Id.* at 818-19. Citing the clear federal policy favoring avoidance of piecemeal litigation of water rights in a river system, and other factors, the Court upheld dismissal by the district court. *Id.* at 819-20. *Colorado River* established that dismissal was proper, even when matters of substantive federal law were involved in the case, and that principles of effective judicial administration were important considerations in making this discretionary judgment.

In *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), the district court stayed an action seeking damages for violations of the federal securities laws and Rule 10b-5 of the Securities and Exchange Commission. Plaintiff's claim under Rule 10b-5 was committed to the exclusive jurisdiction of the federal courts under the Securities Exchange Act of 1934, 15 U.S.C. § 78 (aa). This claim was pending as a defense in a prior state court action. 437 U.S. at 658-59. Judge Will stayed all issues subject to concurrent jurisdiction and did not take any action toward decision of the Rule 10b-5 claim. *Id.* at 659-60. The Seventh Circuit issued a writ of mandamus. The Supreme Court granted certiorari to consider whether the writ of mandamus "impermissibly interfered with the discretion of a district court to control its own docket." *Id.* at 661. This Court reversed. Justice Rehnquist's

plurality opinion concluded that the federal court plaintiff had not demonstrated a "clear and indisputable" right to issuance of mandamus because the decision to stay was committed to the discretion of the district court, "even when matters of substantive federal law are involved in the case." *Id.* at 664.

Four justices dissented. Chief Justice Burger concluded that "a federal court remains under an obligation to expeditiously consider and resolve those claims which Congress explicitly reserved to the federal courts." *Id.* at 668 (Burger, C. J., dissenting). Justice Brennan's dissent argued that the grant of exclusive jurisdiction showed "a legislative desire for the uniform determination of such claims by tribunals expert in the administration of federal laws and sensitive to the national concerns underlying them"[6] *Id.* at 670 (Brennan, J., dissenting).

Concurring in reversal, Justice Blackmun concluded that the court of appeals should have required reconsideration of the stay by the district court in light of *Colorado River*. 437 U.S. at 668 (Blackmun, J., concurring). Following reversal by this Court, the Seventh Circuit examined the evenly divided opinions in *Will* and found that Justice Blackmun's concurrence provided the narrowest ground for decision. *Calvert Fire Insurance Co. v. Will*, 586 F.2d 12, 14 (7th Cir. 1978). On remand, Judge Will reconsidered the stay order in light of *Colorado River*, and continued the stay. *Calvert Fire Insurance Co. v. American Mutual Reinsurance Co.*, 459 F. Supp. 859 (N.D. Ill. 1978). Expressing concern that the Supreme Court's even division in *Will* had "introduced uncertainty," Judge Will argued for "the necessity of broad control by district courts of their own dockets in the interests of efficiency, economy and avoidance of duplication in litigation." *Id.* at 865-66. The Seventh Circuit then affirmed continuation of the stay, holding that "[t]he district judge's

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[6] Justice Brennan also questioned the plurality's reliance on *Brillhart* and its failure to consider the potential preclusive effect of a state court determination on a claim within the exclusive jurisdiction of the federal courts. 437 U.S. at 674-76 (Brennan, J., dissenting).

exercise of discretion should be based on his weighing of a combination of factors . . . counselling for or against the exercise of jurisdiction in the case before him." *Calvert Fire Insurance Co. v. American Mutual Reinsurance Co.*, 600 F.2d 1228, 1234 (7th Cir. 1979). The Seventh Circuit's interpretation of *Will* is correct. It is consistent with the fundamental principle that the district courts have inherent discretion to stay proceedings for reasons of sound judicial administration and comity.

In the instant case, the district court stayed Mercury's action pending decision by the state court of the identical arbitrability issue. In support of its stay order, the district court expressly relied on the analysis and holding in *E. C. Ernst, Inc. v. Potlatch Corp.*, 462 F. Supp. 694 (S.D.N.Y. 1978), a case on point both factually and procedurally. (Cert. App. A38) In *Ernst*, the district court stayed a petition to compel arbitration pending resolution of the identical arbitrability issue in state court. The *Ernst* court applied *Colorado River* and found that most of the circumstances listed therein were present. It concluded that "all considerations of convenience, judicial economy and comity militate in favor of such stay." 462 F.Supp. at 700. The court determined that the Federal Arbitration Act did not compel it to exercise diversity jurisdiction or remove its discretion to stay proceedings.[7] *Id.* at 700-01.

By staying its consideration of Mercury's petition rather than dismissing it, the district court fulfilled its obligation to exercise jurisdiction. Stay orders are not final decisions. A stay tolls the running of a statute of limitations, while a dismissal may result in a time bar. Dismissal requires the assessment of costs and closing of the court file. Dismissal

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[7] In the only other case addressing this specific question, the First Circuit agreed that the Federal Arbitration Act does not compel a district court to proceed in blind disregard of potential duplication, inconsistency and inefficiency, and it rejected the argument that the choice of forum by a section 4 plaintiff is "conclusive." *Acton Corp. v. Borden, Inc.*, No. 81-1512, slip op. at 10 (1st Cir. Feb. 12, 1982).

terminates jurisdiction, while a stay preserves it. A court entering a stay thus asserts and retains jurisdiction over the cause and may revise or withdraw the stay at any time upon motion. In *Ernst*, the court found that a stay "rather than a dismissal is appropriate here in order to insure a just disposition of this litigation should anything prevent a prompt state court determination." *Id.* at 701. In *Will v. Calvert Fire Insurance Co., supra*, Justice Rehnquist stated that "[s]ince [the district judge] did not dismiss the action, Calvert remained free to urge reconsideration of his decision to defer based on new information as to the progress of the state case; to this extent, at least, deferral was *not* equivalent to a dismissal." 437 U.S. at 665 (emphasis in original). On remand, Judge Will emphasized the importance of this distinction in continuing the stay. 459 F.Supp. at 863-64. *See also State Farm Mutual Automobile Insurance Co. v. Scholes*, 601 F.2d 1151, 1156 (10th Cir. 1979) (Logan, J., concurring); *Chintala v. Diamond Reo Trucks, Inc.*, 393 F.Supp. 1392, 1394 (E.D. Pa. 1975). Since a stay preserves jurisdiction and is subject to reconsideration at any time, the district judge should have wider discretion to stay than to dismiss.

B. Policies Supporting the Stay

Policy considerations strongly support the stay in this case. Outlined here, these considerations are then discussed in detail: (1) policies underlying the relevant statutes verify that state court is the proper forum; (2) piecemeal litigation is avoided; and (3) the state court first assumed jurisdiction.

Federal Statutes. The Federal Arbitration Act alone does not furnish grounds for subject matter jurisdiction over petitions to compel arbitration. Under section 4 of the Act a party may file a petition in a district court "which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter . . . ." 9 U.S.C. § 4. The district courts thus have jurisdiction over

these actions only when an independent basis of federal jurisdiction exists. *See Commercial Metals Co. v. Balfour, Guthrie & Co.*, 577 F.2d 264, 268 (5th Cir. 1978); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 408 (2d Cir. 1959), *cert. dism.*, 364 U.S. 801 (1960). The Second Circuit noted in *Robert Lawrence* that "the most numerous class of cases in which it was anticipated that resort would be made to the federal courts for the enforcement of arbitration agreements was diversity cases." 271 F.2d at 409.

By requiring an independent jurisdictional basis, Congress determined that federal courts would be unavailable in many situations. For example, the parties might be nondiverse, or the amount in controversy might not meet the $10,000 requirement. Thus, because Congress made all written arbitration agreements in contracts "evidencing a transaction involving commerce" valid under section 2 of the Act, it contemplated that the federal courts were not the exclusive forum for enforcement of the Act. Congress entrusted this responsibility to the courts of the several states as well.[8] The Fifth Circuit in *Commercial Metals Co. v. Balfour, Guthrie & Co., supra*, stated that "[i]t is clear that the state courts are entirely able, as well as required, to apply the United States Arbitration Act and compel

[8] The legislative history of the Federal Arbitration Act is instructive. Section 8 of the original bill provided that "if the basis of jurisdiction be diversity of citizenship" the district court would have jurisdiction even though the amount in controversy was unascertained or was to be determined in arbitration, despite the then-applicable $3,000 threshold requirement. H. R. 646, 68th Cong., 1st Sess., 65 CONG. REC. 11081 (1924). The Senate amended the bill to delete this provision. S.1005, 68th Cong., 2d Sess. 66 CONG. REC. 2759-62 (1925). The Senate version was passed by the House and became law. H. R. 646, 68th Cong., 2d Sess., 66 CONG. REC. 3003-04 (1925). Congress thus rejected a provision which would have given the federal courts broader jurisdiction in actions under the Act than normally possessed by the federal courts. This reinforces the conclusion that Congress intended to confine federal court jurisdiction to its traditional boundaries and that responsibility for enforcement of the Act also was vested in state courts.

arbitration pursuant to the Act if the statutory requisites are present." 577 F.2d at 269. The North Carolina Supreme Court has determined that the Supremacy Clause of the United States Constitution (Article VI, Clause 2) requires it to interpret and apply the Federal Arbitration Act.[9] *Burke County Pub. Schools Bd. of Educ. v. Shaver Partnership*, 303 N.C. 408, 279 S.E.2d 816 (1981). Unlike *Will v. Calvert Fire Ins. Co., supra*, this case involves no aspect of exclusive federal jurisdiction: the state courts are proper forums.

Mercury invoked the jurisdiction of the district court under the diversity statute, 28 U.S.C. § 1332. The removal statute, 28 U.S.C. § 1441, helps to effectuate the policy underlying diversity jurisdiction by enabling a foreign defendant in a state court to seek protection from potential local bias when complete diversity exists among the parties. The removal statute also places definite limits on this policy judgment: removal is unavailable under § 1441 (c) if the state suit involves other nondiverse defendants and claims that are not separate and independent. Section 1441 (c) expresses the policy judgment that the state court defendant does not require protection when the defending parties include a local resident because the likelihood of local prejudice is reduced. That is precisely the situation in the instant case.[10] By

[9] The vast majority of the state courts considering the question have held that the Act must be applied in the state courts. *See e.g., Allison v. Medicab International, Inc.* 92 Wash. 2d 199, 597 P.2d 380 (1979); *West Point-Pepperell, Inc. v. Multi-Line Industries, Inc.*, 231 Ga. 329, 201 S.E.2d 452 (1973), and cases cited in *Burke County, supra*, 279 S.E.2d at 824 n. 15. A few state courts, however, have held the Act inapplicable even when the transaction involved commerce. *Pullman, Inc. v. Phoenix Steel Corp.* 304 A.2d 334 (Del. Super. 1973); *Standard Co. of New Orleans, Inc. v. Elliott Const. Co.*, 363 So.2d 671 (La. 1978). This Court may assure uniformity by pointing out in the instant case that the Supremacy Clause requires the state courts to apply the Act when the interstate commerce prerequisite is satisfied.

[10] *See* Order of Remand and Memorandum Opinion. (Cert. App. A33-A37)

precluding removal in this situation Congress reinforced the policy judgment implicit in the grant of concurrent jurisdiction under the Federal Arbitration Act: the state forum is adequate and appropriate for decision of the controversy. These policy judgments weigh in favor of the stay.[11]

Avoiding piecemeal litigation. Mercury's federal action was duplicative, a reaction to the declaratory judgment action filed by Hospital nineteen days earlier in state court.[12] Mercury could have asserted any claim arising under the Federal Arbitration Act in the state court action, which it wrongfully removed to federal court. (Cert. App. A33-A37) Instead, it filed an independent action requiring duplicative, simultaneous proceedings in both courts.

In his Memorandum Opinion, the district judge concluded that Hospital's declaratory judgment action involved a " 'single wrong . . . arising from an interlocked

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[11] The analysis of the policy choices underlying the jurisdictional grant and the removal statute is suggested and applied in precisely this situation in Note, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River*, 44 U. Chi. L. Rev. 641, 668 (1977). It is also instructive to compare the wording of the statutes forming the bases for jurisdiction in the district courts in *Colorado River* and in this case. In *Colorado River*, the United States invoked the jurisdiction of the district court under 28 U.S.C. § 1345, which states that "the district courts shall have original jurisdiction of all civil actions . . . commenced by the United States . . . ." The diversity statute, 28 U.S.C. § 1332(a), states that "[t]he district courts shall have original jurisdiction of all civil actions" where the amount in controversy exceeds $10,000 and the parties are citizens of diverse states. Since the "shall have original jurisdiction" language of § 1345 was no bar to dismissal in *Colorado River*, the identical language in § 1332(a) should receive similar treatment here.

[12] "Reactive suits" are filed by the defendant to a prior action against the original plaintiff asserting a claim arising out of the transaction that is the subject of the first action. Note, *supra* note 11, 44 U. Chi. L. Rev. at 643 (1977). "Reactive suits are often brought in order to obtain the supposed tactical advantages that inhere in proceeding as a plaintiff, to take advantage of, or avoid, perceived prejudices of a particular forum . . . ." *Id.*

series of transactions.' " (Cert. App. A35-A36) The substantive dispute concerning responsibility for alleged delays in completing construction involves all three principal participants in the project. Only the state court had before it the three principals to the underlying dispute. Because both Hospital and Pease are incorporated in North Carolina, the federal court could not bring before it all necessary parties. The state court was empowered not only to determine the arbitrability question, but also, if necessary, to resolve all disputes among the three necessary parties. That is not possible in federal court. Thus, the interest in avoiding piecemeal litigation and in providing for comprehensive resolution of disputes in a single forum is served by the stay.

Priority of filing. The state court obtained jurisdiction before the institution of the federal action. Priority of filing is a relevant factor for two principal reasons. First, when questions arise concerning the concurrent jurisdiction of federal and state courts, considerations of comity are implicated. The doctrine of comity encompasses the important interest in maintaining amicable relations between the judicial systems and it thus "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Darr v. Burford*, 339 U.S. 200, 204 (1950). Interference in the orderly disposition of cases by precipitating an unseemly race to judgment in a concurrent forum should be discouraged. Second, the institution of a reactive suit in another court raising identical issues is a strong indication that the plaintiff in the reactive suit is forum-shopping.[13] Mercury could have obtained quick resolution of the arbitrability question by filing in state court a motion for stay of the state proceedings pending arbitration or by denying Hospital's allegations and moving for summary judgment. If the critical federal policy involved in

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[13] *See* note 12, *supra*.

the instant case is the "unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts," *Prima Paint Corp. v. Flood & Conklin Mfg. Co*, 388 U.S. 395, 404 (1967), it is important to recognize that Mercury's attempt to change forums is directly responsible for the delay in this case.

C. The Fourth Circuit Opinion

The Fourth Circuit held that the district court found no "exceptional circumstances" justifying the stay order. 656 F.2d at 945. This is clear error. The district court's express reliance on the analysis and holding of *E. C. Ernst, Inc. v. Potlatch Corp., supra,* constituted an adoption of the assessment of circumstances favoring a stay made in that case. Because *Ernst* and the instant case are factually and procedurally indistinguishable, no more was required. Moreover, the Fourth Circuit stated that the record here contained no "exceptional circumstances" justifying the stay, and expressly rejected the *Ernst* decision. 656 F.2d at 945 n. 21. The majority opinion refused even to acknowledge the clear presence here of the circumstances expressly enumerated in *Colorado River* and found to be present by *Ernst:* the assumption of jurisdiction first by the state court, the desirability of avoiding piecemeal litigation, and the availability of a comprehensive disposition of all questions in the state court. The Fourth Circuit therefore requires that the circumstances necessary to justify a stay be even more "exceptional" than the circumstances enumerated by *Colorado River* as justifying dismissal. Given the distinctions between a dismissal and a stay, this conclusion defies reason. The circumstances in which a stay is appropriate must be less compelling (or "exceptional") than those justifying dismissal, because dismissal is by far the more drastic remedy. The district court should have wider discretion to stay than to dismiss.

The Fourth Circuit placed improper emphasis on the word "exceptional" as used in *Colorado River*. It was not used to establish a mechanical test to be applied by the district courts in determining whether stays or dismissals are appropriate in a given situation. Rather, this Court was careful not to prescribe a specific standard in *Colorado River*, leaving the determination to the "carefully considered judgment" of the district court, taking into consideration "both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise." 424 U.S. at 818. If the Court did prescribe a rigid "exceptional circumstances" standard in *Colorado River*, as the Fourth Circuit perceived, application of that standard should be limited to cases in which dismissal is sought.

In addition, the Fourth Circuit misapplied *Will* and the cases from the Seventh Circuit following it. The Seventh Circuit and the Fourth Circuit agree only to the extent that both find Justice Blackmun's concurrence in *Will* controlling. The Fourth Circuit found that Justice Blackmun would have left the determination whether "exceptional circumstances" existed to the district court. 656 F.2d at 943. This conclusion led the Fourth Circuit to examine the opinion written by Judge Will on remand. The Fourth Circuit reasoned that he reinstituted the stay *only* because it constituted no more than a " 'reactive defensive maneuver' " and a " 'contrived' federal claim." *Id.* at 944.

This interpretation of Judge Will's opinion became the controlling authority as the Fourth Circuit majority then sought to determine only whether either Hospital's state court action or Mercury's federal court action was a " 'reactive' or 'tactical maneuver.' " [14] *Id.* The majority opined that the prior state action initiated by Hospital fit that

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[14] The Fourth Circuit considered Judge Will's opinion, but did not cite or refer to the Seventh Circuit's culminating opinion in the *Will* line, which affirmed the continuation of the stay order and emphasized the importance of preserving the district court's discretion. *See* text following note 6, *supra*.

category, making a stay inappropriate.[15] As demonstrated above, Mercury instituted the reactive and duplicative litigation in federal court. More important than any perception, conclusion or rationale of the Fourth Circuit, however, is the fact that the court of appeals usurped the district court's discretion and substituted its judgment for that of the district judge.[16] The discretion to stay is a power

[15] The Fourth Circuit majority found that the only reason for Hospital's "precipitate resort to its state action" was an attempt to effectuate its "basic position" that the rights of Mercury and Hospital are governed by state law, not the Federal Arbitration Act. 656 F.2d at 945. This simply is not true. Hospital does not contend, as the majority asserts, that if the contract evidences a transaction in interstate commerce, the North Carolina Arbitration Act would apply nevertheless. Despite the similarities between the Uniform Arbitration Act, adopted in North Carolina in 1973, N.C.G.S. § 1-567.1 *et seq.*, and the Federal Arbitration Act, Hospital has argued consistently that the North Carolina courts are obligated by their oaths to apply the federal act. Citing two cases from the intermediate appellate court of North Carolina that addressed the commerce question, the Fourth Circuit majority questioned the ability and competence of the North Carolina courts to apply the federal act. 656 F.2d at 945-46. The North Carolina Supreme Court dispelled all such concerns in *Burke County Pub. Schools Bd. of Educ. v. Shaver Partnership*, 303 N.C. 408, 279 S.E.2d 816 (1981), a decision brought to the Fourth Circuit's attention on motion for rehearing, holding that the Act was applicable in the North Carolina courts under the Supremacy Clause. The expressions of doubt by the Fourth Circuit as to the ability and competence of the North Carolina courts to adjudicate matters of federal law were inappropriate. This Court stated in *Defiance Water Co. v. Defiance*, 191 U.S. 184, 194 (1903), that "the presumption is in all cases that the state courts will do what the Constitution and the laws of the United States require." *See also Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962).

[16] In *Piper Aircraft Co. v. Reyno*, _____ U.S. _____, 70 L. Ed. 2d 419 (Dec. 8, 1981), the Court found that application of the forum non conveniens doctrine "is committed to the sound discretion of the trial court," and that the trial court's balancing of factors "deserves substantial deference." 70 L. Ed. 2d at 436. Upholding the district court's dismissal order, the Court observed that by reversing, the appellate court had impermissibly "substituted its judgment for that of the District Court." *Id.*

inherent in the district court. Here the district court clearly was in the best position to assess the merits of the state court action and the intentions of Hospital in filing it. The district court gave detailed consideration to the nature and merits of the state court action when it ruled on the motion to remand that case. The district court had both cases before it, while the court of appeals did not have that advantage. Only the dissents below properly emphasized the respect to be accorded the district court's assessment of the relevant circumstances. 656 F.2d at 947-48 (Widener, J., dissenting).

Statutes granting jurisdiction to the federal courts over a wide variety of substantive matters have proliferated. [17] Moreover, cases based on diversity jurisdiction continue to occupy a substantial portion of the workload of federal district judges, despite criticisms of and efforts to limit this jurisdictional grant. [18] The Fourth Circuit's strict circumscription of the "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants" [19] is impractical and impermissibly restrictive. In view of the explosion of litigation in the federal courts, the desirability of preserving amicable relations between state and federal courts, and the necessity for efficient implementation of judicial resoures, the district courts must

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[17] *See* R. Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 233 (1976).

[18] Of all private civil cases filed in the United States district courts during the year ending June 30, 1981, approximately 25 percent were diversity cases. While the total number of civil cases filed during this period increased by 7 percent over the preceding year, diversity filings increased by 15.6 percent. *1981 Annual Report of the Director of the Administrative Office of the United States Courts*, Preliminary Ed., at 4. For an assessment of the "mounting mischief inflicted on the federal judicial system by the unjustifiable continuance of diversity jurisdiction," *see Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring). *See also* Bork article, note 17 *supra*, 70 F.R.D. at 236-37.

[19] *Landis v. North American Co.*, *supra*, 299 U.S. at 254.

have enhanced, not confined, discretion to stay. Only by reversing the judgment of the court of appeals can this Court enhance the discretionary power of the district courts to manage and control their dockets efficiently.

II. THE ORDER OF THE DISTRICT COURT STAYING PROCEEDINGS IS NOT APPEALABLE UNDER 28 U.S.C. § 1291.

Under 28 U.S.C. § 1291 the courts of appeals have "jurisdiction of appeals from all final decisions of the district courts." The stay order in the instant case is not a "final decision."[20] This Court consistently has interpreted the language of § 1291 as forbidding an appeal until there has been "a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978), quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945). The policy judgments underlying the finality requirement deserve strong support. By forbidding piecemeal appeals, Congress sought to prevent delay in reaching the merits of cases, excessive harassment and costs to litigants, and the overburdening of the appellate courts. *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940). The finality requirement of § 1291 preserves the independence of the district judge by emphasizing "the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981).

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[20] The majority's statement that Mercury sought review under both 28 U.S.C. § 1291 and § 1292(a) is clearly erroneous in light of Mercury's express abandonment of an interlocutory appeal. (Cert. App. A44 n. 1) Moreover, the majority's statement that Mercury is "entitled to a direct appeal," and its citation of *Amdur v. Lizars*, 372 F.2d 103 (4th Cir. 1967), reflect its view that § 1291 sanctions appeal. 656 F.2d at 937-38.

These policy considerations are particularly strong in the instant case. Since the stay is a matter committed to the discretion of the district judge, the appellate courts must be watchful to preserve the independence of the district judge. The policy favoring promotion of efficient judicial administration by preventing delays in resolving the merits of cases also counsels against appealability in the instant case. By entering the stay order, the district judge deferred to the state court, which was prepared to rule on the arbitrability question promptly. The mandamus/alternative appeal procedure employed by Mercury has only delayed resolution of the substantive dispute.

In finding that the stay order in the instant case was appealable, the Fourth Circuit relied on its decision in *Amdur v. Lizars*, 372 F.2d 103 (4th Cir. 1967), which noted that a stay order was "in the usual case, not appealable," but that in the circumstances presented it "amount[ed] to a *dismissal* of the proceedings," and was thus "final" and appealable. 372 F.2d at 105-06 (emphasis in original). Adoption of this analysis by the Fourth Circuit here undercuts the finality requirement and improperly blurs the distinction between stays and dismissals. In *Will v. Calvert Fire Insurance Co., supra*, Justice Rehnquist pointed out that by entering the stay order "the District Court has rendered no final decision." 437 U.S. at 664. Justice Rehnquist recognized that since the district court in *Will* had chosen to stay the action, rather than dismiss it, the court remained free to reconsider the deferral decision, concluding that "to this extent, at least, deferral was *not* 'equivalent to a dismissal.' " *Id.* at 665 (emphasis in original). As demonstrated above, a stay is a tentative, interlocutory order that does not end the litigation on the merits. The district court here never reached the merits, but was free to do so at any time upon motion.

The Fourth Circuit's application of the "final decision" requirement of § 1291 violates the strict construction of the finality requirement mandated by decisions of this Court. In *Coopers & Lybrand v. Livesay, supra*, 437 U.S. at 469-76,

the Court rejected the "death knell" exception to the finality requirement of § 1291. Several courts of appeals had fashioned the "death knell" exception to permit appeal of an order denying class certification "if the court concludes that the ruling, as a practical matter, makes further litigation improbable . . . ." *Id.* at 471. The Court found that "the principal vice of the 'death knell' doctrine is that it authorizes *indiscriminate* interlocutory review of decisions made by the trial judge." *Id.* at 474 (emphasis by the Court). The Court reasoned that although special rules relating to class actions had been developed, "those rules do not . . . contain any unique provisions governing appeals." *Id.* at 470. The Court noted that if the "death knell" doctrine had merit, it would necessarily apply to any interlocutory order that might have "tactical economic significance" amounting to a " 'death knell' for the entire case." *Id.* The Court thus rejected an analysis requiring the courts of appeals to assess on a case-by-case basis the practical effect of a district judge's interlocutory ruling in the course of litigation. This is precisely the analysis employed by the Fourth Circuit below. By rejecting the "death knell" doctrine in *Coopers & Lybrand,* the Court prohibited the development of an "effective finality" exception to § 1291.

Moreover, it is important to recognize that the stay order here is not tantamount to a " 'death knell' for the *entire case*" (emphasis added), because Mercury will have the opportunity to present its claim that arbitration is required in the state court. The significance of the stay order was that the arbitrability question was to be ruled on promptly by the state court. In *Acton Corp. v. Borden, Inc.*, No. 81-1512 (1st Cir. Feb. 12, 1982), the First Circuit ruled that the stay of a petition to compel arbitration under section 4 was not appealable because the party seeking to compel arbitration had an opportunity to assert that claim in the parallel proceeding deferred to by the staying court. The First Circuit examined the appealability analysis of the Fourth Circuit in the instant case and concluded that if the opinion below

found " 'effective dismissal' in the fact that the merits are likely to be decided by the 'proceeding' court rather than the 'staying' court," it chose not to follow the decision:

> Since the very purpose of this type of stay is to allow a different court first to decide central, and perhaps determinative, issues, any such rule would seriously undermine the presumption against appealability of stay orders, with consequent delays in litigation.
>
> Slip op. at 8.

The stay order entered by the district court below did not effectively terminate the litigation. It retained jurisdiction and simply deferred to the court first exercising jurisdiction over the arbitrability question.

In *Coopers & Lybrand* and *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), the Court also analyzed the "collateral order" exception to the finality requirement of § 1291 first articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The elements of the "collateral order" exception were set forth in *Coopers & Lybrand* as follows:

> To come within the "small class" of decisions excepted from the final judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.
>
> 437 U.S. at 468.

In *Coopers & Lybrand*, the order was subject to revision in the district court, and thus did not meet the "conclusive determination" requirement. *Id.* at 469. Similarly, the order in the instant case is subject to revision at any time. This

limited exception to the finality requirement of § 1291 is inapplicable here. In *Firestone*, this Court stated:

> Because the litigation from which the instant petition arises had not reached final judgment at the time the notice of appeal was filed, the order denying petitioner's motion to disqualify respondent is appealable under § 1291 *only* if it falls within the Cohen doctrine.
>
> 449 U.S. at 375 (emphasis added).

The "collateral order" doctrine was described in *Firestone* as "a narrow exception to the requirement that all appeals under § 1291 await final judgment on the merits." *Id.* at 374. Because the "collateral order" rule is inapplicable in the instant case, it is unnecessary for this Court to pass on its continuing viability. However, the exception to the "final decision" requirement of § 1291 endorsed by the Fourth Circuit constitutes a dangerous encroachment upon the policy considerations underlying that provision. Professor Moore notes that "[a]ppellate courts are spending far too much time in determining whether to hear cases when this time would be better spent on the merits of cases presented to them." 9 *Moore's Federal Practice* ¶ 110.07, at 110 (2d ed. 1980).

Because of the rapid increase in the workload of the courts of appeals, [21] it is important to maintain strict limitations on appealability and to assure certain application of the "final decision" requirement of § 1291. Endorsement of a loosely worded, difficult of application "effective finality" exception would lead to greater uncertainty and the

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[21] In the year ending June 30, 1981, appeals of private civil actions from district courts to courts of appeals increased by 18.4 percent over the previous year. *1981 Annual Report, supra* note 18, at 2. In the year ending June 30, 1980, appeals of private civil actions increased by more than 23 percent over the preceding year. *1980 Annual Report of the Director of the Administrative Office of the United States Courts*, at 2.

necessity for more threshold determinations of appealability. The result will be further crowding of dockets in the courts of appeal. Carving out additional exceptions or artificially extending the concept of finality only serves to obstruct the administration of justice in both the appellate and district courts.[22] A "final decision" is precisely that: final judgment on the merits.

Although the policy considerations underlying § 1291 mandate its strict application, Congress built into the scheme of federal appellate jurisdiction a sufficient measure of flexibility by enacting the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292 (b). In *Coopers & Lybrand*, the Court noted that § 1292 (b) "was enacted to meet the recognized need for prompt review of certain nonfinal orders." 437 U.S. at 474. This provision establishes a "screening procedure," requiring certification of an interlocutory appeal by the trial judge, thereby "ensuring that such review will be confined to appropriate cases and avoiding time-consuming jurisdictional determinations in the court of appeals." *Id.* at 474-75. *See also Firestone Tire & Rubber Co. v. Risjord, supra*, 449 U.S. at 378 n. 13. In the instant case, Mercury did not request certification. It sought instead to pursue mandamus and the "alternative appeal" under § 1291.

Congress could have chosen to permit the federal appellate courts to determine the extent of their jurisdiction on a case-by-case basis. Instead, Congress has exercised its power under Article I, Section 8 of the United States Constitution to prescribe limits on federal appellate jurisdiction. Expansion of appellate jurisdiction by the court of appeals violates the clear intent of Congress expressed in § 1291 to circumscribe strictly federal appellate review. The entry of the stay order by the district judge in the instant case was designed to promote efficient and effective administra-

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[22] Professor Moore notes that the appellate courts have "struggled with the *Cohen* rule ever since its advent in a laudible attempt to prevent if from engulfing the final judgment rule." 9 *Moore's Federal Practice* ¶ 110.10, at 134.

tion of justice at the trial court level. The same fundamental considerations apply with respect to the appealability of the stay order. Reversal of the Fourth Circuit's holding that the stay order was "final" and appealable and reinstatement of the stay order would promote efficient judicial administration at both the district and appellate levels.

III. THE FOURTH CIRCUIT ABANDONED THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS, MISLED THE LITIGANTS AS TO THE NATURE OF THE MATTERS UNDER REVIEW, AND DENIED THE PARTIES THE STATUTORY RIGHT TO BE HEARD.

Mercury sought review of the district court's stay order by means of a petition for writ of mandamus filed with the Fourth Circuit. Mercury alternatively requested that the petition be treated as notice of appeal "should this Court determine that mandamus will not lie . . . ."[23] (J.App. 11) Federal Rule of Appellate Procedure 21 (b) prohibited response by Judge Ward or Hospital to the petition for mandamus in the absence of authorization by the court of appeals.[24] Hospital therefore took the only action available; it filed a motion to dismiss the "alternative" appeal. The first action by the court of appeals was an order directing that a hearing be held before a three-judge panel only on Mercury's application for the writ of mandamus. The order granted the Hospital leave to appear and be heard at the hearing. (Cert. App. A39) Neither Judge Ward nor Hospital were permitted to file an answer to the petition.

On the date of the hearing, the panel entered an order, which was filed under docket numbers for both the mandamus action and the alternative appeal, directing submission of simultaneous briefs within ten days. (Cert. App.

[23] Mercury's notice of appeal also stated that it was "alternative" to the petition for mandamus. (Cert. App. A41)

[24] *See* note 2, *supra*.

A40) Both Mercury and Hospital submitted briefs limited to the propriety of mandamus and the alternative appeal. Without having the benefit of a decision by the three-judge panel, the parties were summoned to an en banc rehearing on June 1, 1981. Then, in its August 12, 1981 opinion, the Fourth Circuit majority chose not to address the mandamus petition, determined that a direct appeal was appropriate, decided that the district judge had no discretion to enter the stay order, and proceeded to decide the arbitrability question even though Judge Ward had not reached it.

It may be surmised that the Fourth Circuit adopted an expedited argument schedule and irregular briefing format because of the extraordinary nature of the writ sought by Mercury. Yet the majority decided the case as an appeal without having accorded the parties the benefits of appellate procedures. No order was entered by the Fourth Circuit suspending the appellate rules under Rule 2. The normal briefing pattern, requiring an appellant's brief followed by a reply in advance of oral argument, was abandoned.

More importantly, the court's determination that a direct appeal was permissible, without first addressing the propriety of mandamus (as Mercury had requested), resulted in the invocation of a much less rigorous standard of review. Under 28 U.S.C. § 2106, a court of appeals considering a case on direct appeal has broad authority to "affirm, modify, vacate, set aside or reverse" a district court order, and the court of appeals may direct such further action on remand "as may be just under the circumstances." On the other hand, under the All Writs Act, 28 U.S.C. § 1651 (a), courts of appeals may issue the extraordinary writ of mandamus only when "necessary or appropriate in aid of their respective jurisdictions." The party seeking a writ of mandamus has "the burden of showing that its right to issuance of the writ is 'clear and indisputable.' " *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953).

Merely showing that an order is erroneous may suffice to obtain reversal on direct appeal, while issuance of the writ

of mandamus under such circumstances "would undermine the settled limitations upon the power of an appellate court to review interlocutory orders." *Will v. United States*, 389 U.S. 90, 98 n. 6 (1967).[25] In the Fourth Circuit Hospital contended that because the issuance of the stay order was a matter committed to the discretion of the district judge, Mercury had no "clear and indisputable" right to issuance of the writ of mandamus. The erroneous finding of appealability altered the standard of review employed by the Fourth Circuit in assessing the district court's action. The procedure employed foreclosed argument on the point.

The majority below exceeded even its broad powers of appellate review by deciding the merits of the arbitrability question. The majority concluded that "the right of Mercury to . . . an order of arbitration under section 4 of the Act is beyond dispute," 656 F.2d at 942, despite the complete absence of evidence, argument, or a hearing in either the district court or the Fourth Circuit on the merits of the arbitrability question. The Statement of Issues to be Presented on Appeal, filed by Mercury, includes only the question whether the district court properly entered its stay order. (Cert. App. A46) In his dissent below, Judge Hall noted that "[t]he majority opinion, which in effect directs arbitration, will come as a surprise to all parties. No one argued that this court should decide that issue." 656 F.2d at 948 n. 1 (Hall, J., dissenting).

In making this determination, the Fourth Circuit majority adjudicated matters not properly before it. In doing so it denied Hospital its right to the hearing and further procedural protections guaranteed by the Federal Arbitration

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[25] In *Will v. United States*, the Court stated: "Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. 'Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.' " 389 U.S. at 98 n. 6.

Act, in effect denying due process. The Fourth Circuit asserts that under the Act there are no issues for jury determination in this case. 656 F.2d at 945. This overlooks the plain language of section 4, which provides for a jury determination, upon demand, "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue." Hospital demanded a jury trial in its state court complaint (J.App. 26) and in its response to Mercury's petition to compel arbitration. (J.App. 8) The Fourth Circuit's precipitate ruling on the arbitrability question deprives Hospital of any opportunity to demonstrate that it is entitled to a jury trial under the statute. Moreover, the absence of full hearings, evidence and argument caused the Fourth Circuit to attribute fallacious arguments and deleterious intentions to Hospital and to misapprehend arguments which Hospital never had an opportunity to make.[26]

If given the opportunity, Hospital would assert that it complied with the provisions of the contract for resolution of claims and disputes in every respect. The Fourth Circuit opinion assumes that simply because arbitration now is desired by Mercury and because arbitration is not now under way, the conclusion necessarily follows that Hospital has breached the agreement to arbitrate, or, in the words of the statute, has failed "to comply therewith." 9 U.S.C. § 4. This conclusion is superficial. It would require arbitration *regardless* of the agreement of the parties as to *which* disputes are arbitrable.

The majority below failed to consider the provisions of Articles 2 and 7 of the contract's General Conditions, which provide for a comprehensive mechanism to resolve disputes between Mercury and Hospital arising during the progress of

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[26] Hospital does not argue, as the majority below incorrectly asserts, that some misfeasance or negligence on the part of the architect constitutes a bar to arbitration. This "novel theory," 656 F.2d at 943, has never been put forward by Hospital.

the work. Mercury and Hospital agreed that claims and disputes "shall be referred initially to the Architect for decision" during the progress of the work (General Conditions ¶ 2.2.7, J.App. 28) and that the architect would be the judge of the contractor's performance and interpreter of the contract requirements "in the first instance." (General Conditions ¶ 2.2.6, J.App. 28) A right to arbitration became available only after the architect's initial decision during the progress of the work. (General Conditions ¶ 2.2.10, J.App. 28-29)

If provided the opportunity, Hospital would contend that Mercury's assertion of a cumulative claim for delay damages long after completion of the work is in clear violation of this contractual dispute resolution mechanism, which calls for claims to be decided by the architect as they arise. Hospital did not agree to arbitrate claims never passed upon by the architect during the progress of the work. In sum, the breach of and the failure to comply with the contract provisions relating to arbitration are the acts and omissions of Mercury, not Hospital. Mercury failed to comply with express contractual conditions precedent to a right to obtain arbitration. The architect was not authorized to waive Hospital's rights under the agreement. Hospital complied with the contract provisions in all respects and justifiably opposes this attempt by Mercury to select only those portions of the dispute resolution mechanism that it wishes to enforce. The "agreement to arbitrate" cannot be construed in a factual vacuum. That is precisely why the Federal Arbitration Act preserves the right to jury trial on such disputed factual questions.

The Federal Arbitration Act was enacted to overcome the hostility of the common law to arbitration agreements. *Robert Lawrence Co. v. Devonshire Fabrics, Inc., supra,* 271 F.2d at 406-07. However, the Act contains provisions which protect a party justifiably opposing a petition to compel arbitration: when the making of an arbitration agreement or the failure, neglect, or refusal to perform the

agreement are in issue, a jury trial is available upon demand. 9 U.S.C. § 4. By directing arbitration in the instant case, the Fourth Circuit deprived Hospital of rights and protections granted by Congress, again effectively denying due process.

By refusing to accord Hospital its statutory right to a full and fair hearing and by substituting a highly irregular briefing format and argument schedule, the Fourth Circuit in turn deprived itself of the opportunity to weigh alternative arguments on the several arbitration questions addressed and decided in the opinion. The majority opinion below chose to address important questions of statutory interpretation without the benefit of briefs citing relevant authorities and setting forth alternative analyses of the appropriate roles of courts and arbitrators under the Federal Arbitration Act. [27] For example, the majority concluded that Mercury is not only entitled to an order compelling arbitration, but also that "the right of Mercury to a stay of [state] proceedings . . . is beyond dispute." 656 F.2d at 942. The Act does not empower a federal court to halt proceedings in a state court. 9 U.S.C. § 3. A stay of state court proceedings by a federal court must conform to the requirements of the Anti-Injunction Statute, 28 U.S.C. § 2283, which the majority failed to consider.

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[27] The majority opinion includes a lengthy discussion of the "default" proviso of section 3, particularly addressing whether various "default" questions are matters for arbitrators or courts. 656 F.2d at 939-41. It is not the universal rule that most "default" questions are the province of arbitrators, as the Fourth Circuit asserts. *See United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 597 P.2d 290, 299 n. 2 (1979), *cert. den.*, 444 U.S. 911 (1979), and cases cited therein. In fact, the majority opinion failed to reconcile the clear conflict it created with its own opinion in *American Home Assurance Co. v. Vecco Concrete Const. Co.*, 629 F.2d 961 (4th Cir. 1980), a case in which Mercury itself was a party. The Fourth Circuit's holding in *American Home* that Mercury was not in default because "we believe that Mercury has proceeded with its demand for arbitration in a timely manner," 629 F.2d at 963, must be contrasted with the categorical statement of the majority below that "any claim of untimeliness . . . is for the arbitrator . . . ." 656 F.2d at 942.

At the root of both the procedural irregularities and substantive misapplications of the Act by the Fourth Circuit is the erroneous decision to treat this case as a direct appeal of a final decision under § 1291. The first indication received by Hospital that the standard of inquiry appropriate to appeals would be applied by the Fourth Circuit was upon reading the majority opinion. The alternate proceeding should not be permitted. There should be no doubt in a litigant's mind as to the basic nature of the proceeding in which he is engaged — mandamus or appeal.

Even so, the Fourth Circuit went far beyond the scope of permissible appellate review by deciding the merits of the arbitration question when only the stay order was before the court. By requiring the parties to follow a tortured procedural path and by ruling on the merits of the arbitrability question, the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. Disapproval by this Court of the course of proceedings followed, the analyses employed, and the results reached by the Fourth Circuit is imperative.

CONCLUSION

For the foregoing reasons, Hospital prays that the judgment of the Fourth Circuit be reversed and that the district court's order of stay be reinstated.

Respectfully submitted,

Jack W. Floyd

SMITH MOORE SMITH
SCHELL & HUNTER
500 NCNB Building
Post Office Box 21927
Greensboro, North Carolina 27420
Telephone: (919) 378-1450

OF COUNSEL:

Stephen P. Millikin
Douglas W. Ey, Jr.

Respondent's Brief

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NO. 81-1203

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE MOSES H. CONE MEMORIAL HOSPITAL,
Petitioner

v.

MERCURY CONSTRUCTION CORPORATION,
Respondent

BRIEF OF RESPONDENT

A. H. GAEDE, JR.
Attorney for Respondent
Bradley, Arant, Rose & White
1400 Park Place Tower
Birmingham, Alabama 35203
Telephone (205) 252-4500

OF COUNSEL:
STANLEY D. BYNUM
JOSEPH B. MAYS, JR.
Bradley, Arant, Rose & White
1400 Park Place Tower
Birmingham, Alabama 35203

CHARLES NICHOLS
LINDSAY R. DAVIS
Nichols, Caffrey, Hill,
Evans & Murrelle
P. O. Box 989
Greensboro, North Carolina 27402

FRANK H. MCFADDEN
Executive Office Park
Montgomery, Alabama 36116

QUESTIONS PRESENTED

1. May a federal district court avoid ruling on a timely filed petition to compel arbitration filed under § 4 of the Federal Arbitration Act by staying proceedings on that petition in order to permit a state court, which does not have federal statutory authority to compel arbitration, to decide the federal issue of arbitrability?

2. Did the court of appeals commit reversible error by accepting an appeal under 28 U.S.C. § 1291 of an order of the district court staying a timely filed petition to compel arbitration in order to allow the federal issue of arbitrability to be determined by a state court?

3. Did the court of appeals commit error by rendering a decision on a matter which had been fully briefed and twice argued?

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NO. 81-1203

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE MOSES H. CONE MEMORIAL HOSPITAL,
Petitioner

v.

MERCURY CONSTRUCTION CORPORATION,
Respondent

BRIEF OF RESPONDENT

OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit is reported at 656 F.2d 933 (4th Cir. 1981). (Cert. App. A1) The order of the court of appeals denying rehearing is reported at 664 F.2d 936 (4th Cir. 1981). (Cert. App. A29) The unreported Memorandum Opinion of the District Court for the Middle District of North Carolina appears in the Appendix to the Petition for Certiorari. (Cert. App. A33)

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1). The petition for certiorari was docketed on December 28, 1981, and certiorari was granted by order of this Court dated February 22, 1982.

STATUTORY PROVISIONS INVOLVED

The action before this Court is a petition to compel arbitration filed pursuant to § 4 of the Federal Arbitration Act, 9 U.S.C. § 4:

> *Failure to arbitrate under agreement.*
> Text set forth in certiorari appendix (Cert. App. A47-8)

In addition, § 3 of the Federal Arbitration Act, 9 U.S.C. § 3, is involved:

> *Stay of proceedings where issue therein referable to arbitration.* If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

The court of appeals accepted appeal of the district court decision pursuant to 28 U.S.C. § 1291:

> *Final decisions of district courts.* The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

Mercury Construction Corporation (hereafter "Mercury") is a corporation organized under the laws of the State of Delaware with its principal place of business in

Montgomery, Alabama. In July of 1975, Mercury was awarded a contract by the Moses H. Cone Memorial Hospital of Greensboro, North Carolina (hereafter the "Hospital") to perform renovations and additions to an existing hospital. (J. App. 19) The work was to be performed pursuant to the design and under the direction of J. N. Pease Associates (hereafter the "Architect"). (J. App. 18) By the terms of the contract the Architect was the agent for the Hospital. (Cert. App. A3) The contract was drafted unilaterally by the Hospital and contained a broad agreement to arbitrate that provided in part that "all claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. . . ." (J. App. 29)

Mercury began construction in July, 1975. During construction certain delays and other events occurred that entitled Mercury to additional compensation. At a job meeting in October of 1977 the Hospital, by its agent the Architect, requested that Mercury hold all claims for delay and impact costs until after the work was completed, and Mercury agreed to do so. (J. App. 39) Mercury substantially completed the work in late 1979 and punch list and warranty work continued into 1980. (Cert. App. A3) In January of 1980, as previously agreed Mercury submitted its claims for delay and impact costs to the Architect.

In May of 1980, the Hospital expressed a desire to negotiate a settlement of Mercury's claims. To that end the parties, their counsel and Mercury's scheduling expert met in Alabama during August of 1980. Mercury's expert made a presentation with respect to the claims. At the conclusion of that meeting, Mercury agreed to supply additional information requested by the Hospital and to allow the Hos-

pital's expert to examine Mercury's records. The parties scheduled a second settlement conference for October 13, 1980. (Affidavit of Stanley Bynum attached as Exhibit C to Mercury's Petition for Writ of Mandamus) In September the Architect confirmed its prior informal advice that the claims had merit in a letter sent to the Hospital and Mercury. The Architect noted that the extra compensation due Mercury appeared to be in the $612,692 to $1,246,368 range, but stated that determination of the correct amount due should be based on a more detailed review of Mercury's cost records. (J. App. 40)

On October 7, 1980, one week before the scheduled settlement conference, Alabama counsel for Mercury telephoned counsel for the Hospital to confirm the date of the conference. On the following day, counsel for the Hospital advised counsel for Mercury by telephone that the Hospital was filing suit that day in state court. (Affidavit of Stanley Bynum, *supra*) This was the first occasion that counsel for Mercury had notice that the Hospital would resist arbitration.[1] The state court suit was against both Mercury and the Architect, but claimed no damages from Mercury. Instead, without mentioning the Federal Arbitration Act, 9 U.S.C. §§ 1-9, the Hospital sought a declaratory judgment that it was not obligated to arbitrate and that it owed Mercury nothing. Alternatively, the Hospital sought indemnification from the Architect for any sums found owing to Mercury. (J. App. 17-26) The Architect was not a party to Mercury's contract with the Hospital and was not a party to the agreement to arbitrate.

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[1]Since the parties were discussing settlement, Mercury had no reason to file an arbitration demand and no basis prior to the telephone call to file a petition to compel arbitration in the United States District Court, since 9 U.S.C. § 4 requires a failure, neglect or refusal to arbitrate as a jurisdictional prerequisite.

The following day in accord with the contract Mercury filed an arbitration demand against the Hospital with the American Arbitration Association. Before Mercury could employ North Carolina counsel and file a petition to compel arbitration in federal court, the Hospital, without notice to Mercury, obtained, *ex parte*, an injunction from the state court barring Mercury from taking any action toward arbitration until the state court had held a trial on the issue of arbitrability. (Affidavit of Stanley Bynum, *supra*) This order was clearly violative of this Court's decisions in *Donovan v. City of Dallas*, 377 U.S. 408 (1964) and *General Atomic Co. v. Felter*, 434 U.S. 12 (1977). In deference to the state judiciary, Mercury did not then file a petition to compel arbitration in federal court, but instead moved the state court to vacate its order on the basis of the Federal Arbitration Act, 9 U.S.C. §§ 1-9, and the decisions mentioned above. (Affidavit of Stanley Bynum, *supra*) The state court lifted its injunction on the morning of October 27. That afternoon Mercury filed in the United States District Court for the Middle District of North Carolina the case now before this Court under § 4 of the Federal Arbitration Act, 9 U.S.C. § 4 — a petition to compel arbitration — and removed the prior filed state court case to the same federal district court under 28 U.S.C. § 1441 (c).

Both parties filed in the district court extensive briefs and affidavits with exhibits directed to the petition to compel arbitration. No such materials had been filed by either party in state court. In addition, the Hospital filed a motion to remand the removed action and a motion requesting the district court to stay proceedings on Mercury's petition to compel arbitration.

Despite the requirement of § 4 to hear and decide petitions to compel arbitration on an expedited basis, the district court only heard arguments on and ruled solely on the

Hospital's motions to remand and to stay. The district court on December 24 remanded the removed action to the state court.[2] On that same day in a very brief order the district court indefinitely stayed proceedings on Mercury's petition to compel arbitration "pending resolution of the state court action. . . ." (Cert. App. A38) The district court made no finding of the "exceptional" circumstances requisite for a district court to avoid "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976).

Mercury thereupon filed with the Court of Appeals for the Fourth Circuit alternatively a notice of appeal under 28 U.S.C. § 1291 and a petition seeking a writ of mandamus requiring the district court to vacate the stay order. A three judge panel heard argument from both parties on February 12, 1981, and requested that the parties submit simultaneous briefs. Both parties filed extensive briefs and on June 1, 1981, at the direction of the court of appeals, an *en banc* rehearing was held in which all issues were again fully argued. The court of appeals issued its opinion on August 12, 1981 and denied the Hospital's petition for rehearing on November 24, 1981.[3]

Citing the decisions of this Court in *Colorado River Water Conservation Dist. v. United States, supra* and *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655 (1978), the Fourth Circuit held that the district court had erred in staying pro-

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[2]Mercury believes the remand was erroneous. *See, e.g., Climax Chemical Co. v. C. F. Braun & Co.,* 370 F2d 616, 10th Cir. 1966, *cert. denied,* 386 U.S. 981 and *Carl Heck Engineers, Inc. v. LaFourche Parish Police Jury,* 622 F.2d 133 (5th Cir. 1980).

[3]By agreement of the parties, no further proceedings have occurred in the state court since January, 1981.

ceedings on Mercury's petition to compel arbitration. The court of appeals also found that under the circumstances of this case Mercury was entitled to appeal the district court's order under 28 U.S.C. § 1291 and that on the basis of undisputed facts in the record Mercury was entitled to an order directing arbitration of its claims against the Hospital. The Hospital sought review by this Court and certiorari was granted on February 22, 1982 by order of this Court.

SUMMARY OF ARGUMENT

> "Arbitration is often thought of as a quick and efficient method for determining controversies. Unfortunately, cases involving arbitration clauses sometimes are best remembered as monuments to delay because of the litigation and appeals antecedent to the actual arbitration." *Standard Chlorine of Delaware, Inc. v. Leonard,* 384 F.2d 304, 305 (2d Cir. 1967) (Kaufman, J.)

Mercury entered into a contract[4] that contained a broad agreement to arbitrate providing, in part, for arbitration of "all claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof." (J. App. 29) Disputes arose during the performance of the contract and while negotiations were underway to resolve those disputes, without prior notice the Hospital filed suit in the courts of North Carolina seeking, among other things, a declaration that the agreement to arbitrate was not valid or that Mercury was otherwise in default of that agreement. Mercury immediately filed a demand for arbitration and thereafter promptly[5] filed a petition in the dis-

[4]The contract, including the agreement to arbitrate, was "concededly drafted by the attorneys, or agents for the" Hospital. 656 F.2d at 935.

[5]The federal court action was filed on October 27, 1980, eighteen days after the state court action was filed. The delay occurred because the Hospital obtained *ex parte*, without notice and without a hearing, an

trict court under § 4 of the Federal Arbitration Act seeking an order compelling the Hospital to arbitrate. Only the federal district courts have jurisdiction of petitions under § 4 to compel arbitration.[6] The district court is charged by Congress to

> hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue, the court *shall make an order directing the parties to proceed to arbitration* . . .

9 U.S.C. § 4 (emphasis added).[7] This Court and the courts of appeals have uniformly held that the Federal Arbitration Act evidences a Congressional determination that agreements to arbitrate should be encouraged as an alternative to litigation and "that the arbitration procedure, where selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). Instead of granting the petition to compel arbitration, the district court erroneously stayed all proceedings "pending resolution of the state court action." (Cert. App. A38)

This Court has never approved retreat from the "virtually unflagging obligation of the federal courts to exercise the

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order from the state court in effect enjoining Mercury from seeking to enforce its rights under the Federal Arbitration Act in federal district court. 656 F.2d at 937. That order was clearly violative of this Court's mandate in *General Atomic Co. v. Felter*, 434 U.S. 12 (1977) and on motion of Mercury was dismissed by the North Carolina court. Immediately thereafter, Mercury filed the case now before this Court on writ of certiorari.

[6]"A party . . . may petition any United States district court. . . ." 9 U.S.C. § 4. Under 9 U.S.C. § 3 a party to a pending legal proceeding, state or federal, may request a stay of the proceeding pending arbitration.

[7]This Court has "interpreted § 4 as narrowly limiting the courts to those issues relating to the making and performance of the agreement to arbitrate. [*Prima Paint*] 388 U.S. at 404." *County of Middlesex v. Gevyn Const. Corp.* 450 F.2d 53, 55 (1st Cir. 1971), *cert. denied*, 405 U.S. 955.

jurisdiction given to them." *Colorado River Water Conservation Dist. v. United States, supra,* at 817. The exercise of that jurisdiction should be particularly preserved in situations such as the instant case involving exclusively the enforcement of the federal right to compel arbitration and the application of federal substantive law. In *Colorado River* this Court defined the three categories of cases where abstention is appropriate and then outlined the requirements for a more limited fourth category where under circumstances "considerably more limited than the circumstances appropriate for abstention" the district court could, in effect, abstain. *Id.,* at 817. The instant case falls into none of these four categories. To the contrary, the theory underlying the second of the three abstention categories — that a state court should rule first on important questions of state law — if applied to the instant case logically requires that the federal district court deal with the important federal question. Here the district court avoided the "unflagging obligation . . . to exercise the jurisdiction given" it, without making a finding of any of the "exceptional" circumstances required by this Court in *Colorado River.* The Fourth Circuit after carefully reviewing the record found there were no "exceptional" circumstances and that the district court had erred in imposing a stay. That decision was correct and should be affirmed by this Court.

Affirmance of the Fourth Circuit's decision compelling arbitration will increase confidence in, and could encourage the increased use of, arbitration to settle disputes and at the same time promote the longstanding policy to encourage settlements. Individuals and businesses will be less likely to enter into or to rely upon agreements to arbitrate if this Court rules that a party to such agreements can avoid having a federal district court rule on a petition to compel arbitration by merely filing a non-removable state court ac-

tion. In the instant case, Mercury had not filed either an arbitration demand or a petition under 9 U.S.C. § 4 because of ongoing settlement negotiations. If this Court rules as the Hospital urges, the message to parties, such as Mercury, who enter into agreements to arbitrate in good faith, will be "demand arbitration and sue now and try to settle later unless you are willing to risk losing the right to have a federal district court rule on your petition to compel arbitration."

The Fourth Circuit properly accepted Mercury's appeal pursuant to 28 U.S.C. § 1291. By staying the petition to compel arbitration until the "resolution of the state court action" the district court was left with nothing to do. This Court in *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511, (1950) held that in deciding the question of finality the most important competing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." That holding was quoted favorably in *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-3 (1964). The appeal in the instant case was not a request for "piecemeal review" that disrupted or otherwise interfered with the district court's management of the case pending before it. Rather, the appeal involved the only issue in the case, the federal right of Mercury to compel the Hospital to arbitrate. "The danger of denying justice by delay" was clearly present as a result of the stay; the stay was, in effect, a final order that terminated the federal court litigation; therefore the Fourth Circuit acted properly in accepting the appeal. *Dickinson, supra,* at 511.[8]

[8]The Hospital's attack on the procedures followed by the Fourth Circuit is without merit and does not deserve consideration by this Court. See Part III of this Brief, *infra*.

I. The Fourth Circuit was correct in holding that the district court committed reversible error by staying proceedings on a timely petition to compel arbitration filed under Section 4 of the Federal Arbitration Act in favor of adjudication by a state court.

In this section of the brief Mercury will analyze this Court's decisions in *Colorado River* and *Will v. Calvert Fire Ins. Co.* in the context of this case. Such analysis shows that the Fourth Circuit properly overturned the stay issued by the district court.

A. *The Federal Arbitration Act introduces several important factors that should be considered by the Court.*

The proceedings with respect to the agreement to arbitrate in the federal case and in the state case were not identical. While the issue of arbitrability was raised in both cases, the applicable sections of the Federal Arbitration Act and the relief available under those sections are different. In the district court case Mercury was entitled to an order under 9 U.S.C. § 4 compelling the Hospital to arbitrate. In the state case Mercury's relief would be limited to an order staying the case pending arbitration. 9 U.S.C. § 3.[9]

Whatever the forum, under the Federal Arbitration Act decisions to compel arbitration (§ 4) or to stay pending arbitration (§ 3) are required to be made on an expedited basis and do not involve inquiry into, or determinations with respect to, the merits of the underlying controversy. Congress provided that the court's role was limited to determining whether there was an agreement to arbitrate and whether there was a failure of one party to comply with

[9]The state court action filed by the Hospital does not even refer to the Federal Arbitration Act. If required to proceed in the state court, Mercury in its answer would request a stay pursuant to 9 U.S.C. § 3.

such agreement. When neither of these matters is at issue, as is true in the instant case, "the court shall make an order directing the parties to proceed to arbitration." 9 U.S.C. § 4. If either of these matters is at issue "the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4. In addition, decisions under the Federal Arbitration Act are based on federal substantive law.

B. *Both Colorado River and Will support Mercury's position.*

This Court in *Colorado River* and the plurality, special concurring and dissenting opinions in *Will* reaffirmed the longstanding rule of *McClellan v. Carland,* 217 U.S. 268, 282 (1910) that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *Colorado River Water Conservation Dist. v. United States, supra,* at 817; *Will v. Calvert Fire Ins. Co., supra,* at 662 (plurality opinion) and at 670 (dissenting opinion). And the Court in both cases emphasized "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States, supra,* at 817; quoted with approval in *Will v. Calvert Fire Ins. Co., supra,* at 664 (plurality opinion) and at 669 (dissenting opinion).[10]

This Court in *Colorado River* and each of the three opinions in *Will* recognized certain limited exceptions to the obligation of district courts to retain their jurisdiction. First, this Court described the three abstention categories: (1) where a federal constitutional issue might be mooted

[10]The holdings in *Colorado River* and *McClellan* reiterate the ruling first made by this Court in *Cohens v. Virginia,* 19 U.S. (6 Wheat) 264, 404 (1821) that "[w]e have no more right to decline the exercise of jurisdiction which is given, then to usurp that which is not given."

by state court determination; (2) where the case presents a difficult question of state law having substantial policy importance; and (3) where a criminal defendant seeks to restrain state criminal proceedings. *Colorado River Water Conservation Dist. v. United States, supra,* at 814-16. None of those categories had application in either *Colorado River* or *Will* and none would support the district court's stay in the instant case. To the contrary, the rationale underlying the second category of abstention – that a state court should rule first on important questions of state law – if applied to the instant case, suggests that when an important question of federal substantive law is involved the federal court should retain its jurisdiction and rule.

Second, the majority opinion in *Colorado River* acknowledged that there are "exceptional" circumstances, "considerably more limited than the circumstances appropriate for abstention," when the district court could dismiss in deference to a state court proceeding. *Id.* at 818. Noting that jurisdiction over the entire property interest at issue is an important possible "exceptional" circumstance, *id.* at 818, the Court held that by virtue of the McCarran Amendment the water rights in dispute should be analogized to property. *Id.* at 819. In deciding whether there are "exceptional" circumstances, a federal court may also consider such factors as the inconvenience of the federal forum . . ., the desirability of avoiding piecemeal litigation . . ., and the order in which jurisdiction was obtained by the concurrent forums. . . ." *Id.* at 878. While Justice Blackmun in his limited concurring opinion and Justice Brennan in his dissenting opinion suggested that the plurality decision in *Will* did not properly apply the "exceptional" circumstances criteria set forth in *Colorado River,* the plurality opinion in *Will* did not reject or reverse those criteria.

Justices Blackmun and Brennan (joined by three other justices) questioned the very broad reading of *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942), by the plurality. While we agree that on its facts — the federal case was a declaratory judgment action which did *not* involve federal law — *Brillhart* should have only limited application, even the broad reading of that case by the plurality does not support a reversal of the Fourth Circuit. The plurality opinion cited *Brillhart* for the proposition that "a district court is 'under no compulsion to exercise that jurisdiction' where the controversy may be settled more expeditiously in the state court." *Will v. Calvert Fire Ins. Co., supra,* at 662-3. However, in the instant case the issue is not the resolution of the entire controversy on the merits. The issue is whether Mercury is entitled to have its § 4 petition to compel arbitration decided by the federal courts. In *Will* the district court retained jurisdiction of the 10b-5 claim and would have heard that claim after the state court suit was resolved. Here, if the state court ruled on the question of arbitrability, there would be nothing for the district court to decide.

Several other significant differences between this case and *Will* make clear that the analysis of the plurality Justices in *Will* does not support reversal here. *Will* involved a writ of mandamus and that procedural posture obviously influenced the plurality Justices.[11] The instant case was appealed under 28 U.S.C. § 1291, which Justice Rehnquist viewed as an important distinction:

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[11] Justice Rehnquist first noted that "[t]he correct disposition of this case hinges *in large part on the appropriate standard* of inquiry to be employed by a circuit court of appeals in determining whether to issue a writ of mandamus to a district court." *Id.* at 661, (emphasis added) and later said "[w]hereas a simple showing of error may suffice to obtain a reversal on direct appeal, to issue a writ of mandamus under such circumstances 'would undermine the settled limitations upon the power of an appellate court to review interlocutory orders' [citation omitted]." *Id.* at 661.

> We think it of considerably more importance than did the Court of Appeals that *Colorado River* came before the Court of Appeals on appeal pursuant to 28 U.S.C. § 1291 . . . rather than through an effort on the part of the federal-court plaintiff to seek mandamus.

Id. at 664. In addition, the plurality opinion analogized the district court's stay order to merely establishing his trial calendar noting:

> Had Judge Will simply decided on his own initiative to defer setting this case for trial until the state proceedings were completed, his action would have been the "equivalent" of granting the motion of American Mutual to defer, yet such action would at best have afforded Calvert a highly dubious claim for mandamus. We think the fact that the judge accomplished this same result by ruling favorably on a party's motion to defer does not change the underlying legal question.

Id. at 665. That analogy does not apply to the instant case because Congress in § 4 required that petitions to compel arbitration be decided on an expedited basis prior to the determination of the merits of the underlying controversy. See, *e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, *supra*, at 404.

Further evidence that the decision in *Will* supports the decision of the Fourth Circuit is found in the district court and court of appeals decisions after remand of *Will*. Judge Will noted, among other things, that:

> The conclusion is . . . inescapable that Calvert has elected to emphasize its rule 10b-5 claim *as a tactic to use the federal court's exclusive jurisdiction to secure duplicate adjudications.* The Supreme Court has made very clear that rule 10b-5 must not be allowed to become a source of "vexatious litigation" federalizing state controversies and overriding state policies . . .
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> It would not . . . be fair if Calvert were able to pursue a *dubious claim* over which federal courts have exclusive jurisdiction and thereby interfere with the state court's timely resolution of *the genuine controversy*. . . .
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> • • •
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> We do not believe that *Colorado River* was intended to provide defendants in state court suits a federal forum in which to bring *tactical defensive actions* in which the only exclusive federal claim is a *contrived* one and to foreclose federal district judges from taking appropriate action in such cases.

459 F.Supp. at 863 (emphasis added). Recognizing his responsibility to analyze the facts and to defer to the state court only if there were "exceptional" circumstances, Judge Will then stated:

> We have made the "carefully considered judgment" required by *Colorado River*, 424 U.S. at 818, 96 S. Ct. 1246, and have found that the combination of factors counselling against an "immediate" adjucation in this case outweighs our "heavy obligation to exercise jurisdiction." . . .

Id. at 864.

The court of appeals in a considered opinion noted that:

> The Supreme Court made it clear that the circumstances justifying federal court deferral to a state proceeding are still considerably more limited than the circumstances permitting federal court deferral to another federal court. 424 U.S. at 817, 96 S. Ct. 1236.

600 F.2d at 1233 and that

> . . . Judge Will has since explained in his opinion now under review, and Calvert has admitted, that it has no claim for damages against Amreco, and hence *no claim to the exclusive jurisdiction of the federal courts.* The consequences of a stay in this case are thus altogether different than supposed in these two previous opinions.

Id. at 1235 n.15 (emphasis added). Against that background the court of appeals affirmed Judge Will stating that

> . . . In the absence of a legitimate claim to exclusive federal jurisdiction, we see no reason why a federal court should not stay its hand pending termination of a parallel state proceeding, at least where the district judge has found the federal suit to be vexatious.

Id. at 1235. In other words, on remand Judge Will found the "exceptional" circumstances required by *Colorado River*, and the court of appeals affirmed his finding. As the above quotations make clear, the factual differences between *Will* and the instant case are substantial and telling. The required "exceptional" circumstances simply are not present in this case.[12]

C. *The court of appeals was correct in finding no "exceptional" circumstances to support a stay.*

The district court *did not* make the analysis or find the exceptional circumstances required by *Colorado River*. The

[12]The Hospital's attempt to rely on *E. C. Ernst, Inc. v. Potlach Corp.*, 462 F. Supp. 694 (S.D.N.Y. 1978) is misplaced. In *Ernst* the state court case was in Arkansas where the construction project out of which the dispute arose was ongoing, and the § 4 petition was filed in New York. A cursory reading of the opinion reveals that the court was upset that the plaintiff was asking a New York court to rule on an Arkansas controversy and was frustrated because transfer under 28 U.S.C. § 1404 was not permissible. In the instant case the construction project was in Greensboro, North Carolina, the state court suit in Greensboro and the federal district court suit in Greensboro. Thus, the obvious inconvenience to the parties and witnesses in *Ernst* is not present here. Another basis for distinction is that in *Ernst*, the federal court plaintiff waited about three months after being brought into the state case before filing a § 4 petition. Further, as the Fourth Circuit noted, cases issuing out of the southern district of New York before and after *Ernst* have implicity rejected the rationale of the *Ernst* case. 656 F.2d at 941. See, *e.g., Sumitomo Corp. v. Parakopi Companies Maritime*, 477 F.Supp. 737, 742 (S.D.N.Y. 1979); *Burger Chef Systems, Inc. v. Baldwin, Inc.*, 365 F.Supp. 1229 (S.D.N.Y. 1973). In any case, while factually distinguishable, Mercury submits the district court in *Ernst* misapplied *Colorado River*.

Fourth Circuit made that analysis and found there were no exceptional circumstances. Indeed, of the factors that might constitute exceptional circumstances mentioned in *Colorado River* only one – a prior filed state case – is present in the instant case. That factor is obviously the least important; otherwise, the holding in *Colorado River* that the required circumstances "are considerably more limited than the circumstances appropriate for abstention" is completely avoided. *Id.* at 818. Before responding to the Hospital's attempts to conjure up the required "exceptional" circumstances, this Court should note that the Hospital ignores the most important factor in *Colorado River*.[13] This Court held:

> The most important [factor] is the McCarran Amendment itself. The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property.

Id. at 819. Obviously, there is no *res* in the instant case or anything analogous to a *res*, such as water rights. Equally obvious, in the Federal Arbitration Act Congress embodied the policy favoring speedy arbitration as a means to resolve

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[13]The Hospital mischaracterizes the first of the two issues in *Colorado River* by saying that "the Court first determined that the state court had concurrent jurisdiction . . ." (Pet. Br. 10) To the contrary, the first issue was "'whether the McCarran Amendment terminated jurisdiction of federal courts to adjudicate federal water rights.'" *Colorado River Water Conservation Dist. v. United States, supra,* at 806. In the context of this case the distinction is obviously important. In *Colorado River* there was a question as to whether the federal court had jurisdiction at all, but in the instant case the federal court was the only court that could act on a § 4 petition to compel arbitration.

disputes and in § 4 of that Act gave parties a federal forum to seek an order compelling arbitration.

The Hospital first asserts that "policies underlying the relevant statutes verify that state court *is the proper forum*." (Pet. Br. 14 and 14-17) (emphasis added). While it is true that diversity jurisdiction is required for a § 4 petition to compel arbitration, surely that is not an "exceptional" circumstance as suggested by the Hospital. Otherwise, the mere fact that a litigant was in federal court by virtue of diversity jurisdiction conferred by Congress could be used as a reason to defeat jurisdiction. Congress did not intend such a result and this Court has never so held. Moreover, the instant case involves the federal right to compel arbitration, which is governed by federal substantive law. We agree that if there is no diversity jurisdiction a state court might be requested to rule on a § 3 motion to stay pending arbitration. However, the fact that state courts are competent to enforce the Federal Arbitration Act, does not qualify as an "exceptional" circumstance. For concurrent state-federal jurisdiction to qualify as an "exceptional" circumstance, the state courts would have to be *more* competent with respect to the issue to be decided. It should be beyond dispute that as a general matter the federal district courts are more familiar with and deal more frequently with the federal issue of arbitrability and the federal substantive law to be applied in determining that issue.

The Hospital's attempt to gain support from 28 U.S.C. § 1441 also fails. The Hospital joined a North Carolina resident, its agent the Architect, as a defendant in the state court action.[14] However, the Architect was not a party to

[14]That the Architect was joined to prevent removal was obvious to the Fourth Circuit, 656 F.2d at 944, and to Mercury.

the arbitration agreement and will not be a party to the determination of the issue of arbitrability. The only parties to the issue of arbitrability are the Hospital and Mercury. Moreover, the state court is not a proper forum for a § 4 petition to compel arbitration. Under the Federal Arbitration Act the only remedy available in the state court is to stay the case before it pending arbitration. 9 U.S.C. § 3. Leaving aside the § 3-§ 4 distinction, the federal court, not the state court, is the more appropriate forum.

Next, Petitioner says that "piecemeal litigation is avoided" by the stay. (Pet. Br. 14 and 17-18) That position is an overstatement at best. First, the instant case does not involve duplicative suits on the merits; rather, in this case Mercury sought enforcement of its § 4 remedy to compel arbitration in the district court, which is the only court where that federal remedy can be enforced. The references in Petitioner's brief to the underlying dispute and the district court's opinion *remanding the prior filed state case* are inapplicable and even misleading. Under § 4 the district court is to determine only if there was an agreement to arbitrate and if there has been a failure by the party in default — the Hospital — to comply with that agreement. The language quoted from the district court opinion on remand — "a single wrong . . . arising from an interlocked series of transactions" — had nothing to do with whether the parties had agreed to arbitrate their disputes. Compounding its misleading use of that opinion, the Hospital then states that "the federal court could not bring before it all necessary parties." (Pet. Br. 18) As noted above, the Architect was not even a proper party to a determination of the arbitrability issue, much less a necessary party.

Finally, the Hospital notes that "the state court first assumed jurisdiction," (Pet. Br. 14 and 18-19), which is questionable since "[n]o court has the proceedings *sub judice* at least until such time as it has actually passed upon the merits of some dispute relating to the arbitration." *Ballantine Books Inc. v. Capital Distributing Co.*, 302 F.2d 17 (2d Cir. 1962). Petitioner asserts two alleged reasons why this factor should be given weight – to preserve comity and to discourage forum shopping. Comity is best served by having the more appropriate court decide an issue. Obviously, the federal court is the more appropriate forum to resolve an issue turning exclusively upon federal substantive law. Moreover, in this case the federal court would not be interfering with the state court; rather, the federal court would be enforcing the § 4 remedy that only it can enforce. The Hospital suggests that Mercury's § 4 petition was the result of forum-shopping and that Mercury has caused its own delay. We suppose that every plaintiff is in one sense "forum-shopping," but to accuse Mercury of such in this case almost defies belief. Having negotiated for months, having been afforded access to Mercury's expert and records, having agreed to meet again on a date certain, the Hospital without notice filed suit in the state court joining its own agent, the Architect, to prevent removal. Not satisfied that its race to the state courthouse was adequate to prevent Mercury's access to a federal forum, the Hospital next sought and obtained *ex parte* and without notice an order from the state court restraining Mercury from filing suit in federal court to compel arbitration. Against this background, the court of appeals observed that at issue in this case was "whether [the right to arbitrate], if it exists may be frustrated by the 'reactive' filing of a state declaratory action by the Hospital asserting the non-arbitrability of the dispute before Mercury and any real opportunity to seek

arbitration." 656 F.2d at 938. Mercury did not "attempt to change forums"; rather, Mercury filed its § 4 petition to compel arbitration in the only place it could, the federal district court. To suggest that that filing is what delayed the case is absurd; what delayed the case were the attempts of the Hospital to avoid arbitration and the district court's improper stay order.

D. *The Hospital's suggestion that Colorado River should be reversed or severely limited is without merit.*

Since the requisite "exceptional" circumstances do not exist, the Hospital is forced to make the only argument it can make — this Court could change the criteria established in *Colorado River* and reaffirmed in *Will* and should give district courts unfettered discretion to stay. While Petitioner chides the Fourth Circuit for putting too much emphasis on the word "exceptional" in *Colorado River*, it is not possible to read *Colorado River* any other way. *First*, this Court noted that "abstention from the exercise of federal jurisdiction is the *exception*, not the rule," *id.* at 813 (emphasis added), and quoted with approval from *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959):

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow *exception* to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the *exceptional circumstances* where the order to the parties to repair to the State court would clearly serve an important countervailing interest.

Id. at 813 (emphasis added). Thus, the word "exceptional" was first used by the Court in discussing the abstention categories. This Court recognized a further category where district courts could in effect abstain, but after reaffirming the "virtually unflagging obligation of federal courts to exercise the jurisdiction given them," noted:

> Given this obligation, and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist.

Id. at 818. In other words, this Court made clear that abstention requires "exceptional circumstances" and that the "wise judicial administration" category requires even more "exceptional" circumstances. We do not suggest that the criteria set forth in *Colorado River* should be, or in fact could be, applied mechanically. However, a proper analysis must be made and the criteria must be applied. What the Hospital really urges is that district courts need make no analysis and that district courts should be free to apply or not apply the criteria as they see fit.

The Hospital's argument ignores the fact that the Fourth Circuit treated the stay as a dismissal. That ruling was correct (see Part II of this Brief, *infra*) and therefore the factual predicate necessary for the distinction Petitioner seeks to draw between a dismissal and a stay does not exist. Further, the stay in the instant case was for all practical purposes a dismissal or at the very least came "within what might well be called the 'twilight zone' of finality." *Gillespie v. United States Steel Corp.*, *supra*, at 152. In any event,

since abstention is closely akin to a stay[15] and since abstention is only appropriate in "exceptional circumstances," the purported distinction between a stay and a dismissal does not withstand scrutiny in the circumstances of this case. The concurring and dissenting opinions in *Will* made clear that *Colorado River* is applicable to stay orders. While the plurality in *Will* opined that the stay in that case was not equivalent to a dismissal, the plurality did not base its decision on that distinction nor suggest that such a distinction made *Colorado River* inapplicable to stay orders. Moreover, in *Will* the district court retained jurisdiction of the 10b-5 claim, whereas here the stay, if upheld, would foreclose the federal court from deciding the petition to compel arbitration.

As a final justification for either reversing or ignoring this Court's decision in *Colorado River* the Hospital points to the case load of the federal courts, particularly cases based on federal statutes and diversity jurisdiction. While a real problem, the case load of the federal courts is not in and of itself a basis for denying any litigant the right to have a claim based on a federal statutory right determined by a federal court. Perhaps the Hospital needs to be reminded that the federal legal system was established and functions primarily for the benefit of the litigants and not for the convenience of the judges. Further, there is a general explosion of litigation in both federal and state courts; thus, the problem is not strictly a federal court problem. More important, this Court has recognized the "unmistakably clear Congressional purpose that the arbitration procedure, where selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co., supra,* at 404. To

[15]Most courts of appeals have held that abstention orders are appealable under § 1291. See cases cited in Note 20, *infra.*

assure parties to agreements to arbitrate of a "speedy" resort to arbitration Congress enacted § 4 of the Federal Arbitration Act. If the Hospital's position is sustained with the result that federal courts decline to rule on § 4 petitions, then not only will the "unmistakably clear Congressional purpose" be thwarted, but businesses and individuals will be less inclined to accept arbitration as the means to resolve disputes. In fact, the approach urged by the Hospital might have exactly the opposite effect — *i.e.*, lead to an increase in federal court litigation — and at the same time do severe damage to the longstanding policy to encourage settlements. See, *e.g.*, *St. Louis Mining & Mfg. Co. v. Montana Mining Co.*, 171 U.S. 650, 656 (1898) ("settlements of matters . . . in dispute, without recourse to litigation, are generally favored"). Mercury withheld filing a demand for arbitration and a petition to compel arbitration because of ongoing negotiations to settle its claims.[16]

If this Court rules as the Hospital urges, in the future parties to agreements to arbitrate, such as Mercury, will be very reluctant to proceed with settlement negotiations. Otherwise, the other party, like the Hospital in this case, will be free to negotiate for a while and then without notice file a state court action and thereby deprive the first party of its right to have a federal district court determine the petition to compel arbitration. To avoid loss of the federal forum, parties to agreements to arbitrate would likely file a demand to arbitrate and, if appropriate, a § 4 petition and then offer to negotiate a settlement. Such a result would be wasteful of the parties' time and money, would further burden the federal courts' time and would cause settlement discussions to be held in a less productive, adversarial atmosphere. Finally, the problem of overcrowded federal courts

[16]Until the Hospital filed the state case, Mercury had no notice that the Hospital would seek to avoid arbitration.

is far more likely to be relieved, at least in part, by increasing the confidence of companies and individuals in the arbitration process as Congress intended rather than by this Court permitting district courts to refuse to decide cases properly within their jurisdiction. We submit that such increase in confidence can best be achieved by this Court's adopting positions that will assure that the "arbitration procedure [will] be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co., supra,* at 404. This case affords a vehicle for the Court to so rule.

II. The order of the district court staying proceedings on a petition to compel arbitration and remitting respondent to state court was properly appealable under 28 U.S.C. § 1291.

Despite the unequivocal language of § 4 that "the court *shall* hear the parties, and upon being satisfied of the making of the agreement for arbitration . . . *shall* make an order directing the parties to proceed to arbitration . . ." the district court held no hearing and, in effect, denied or dismissed Mercury's petition by staying all proceedings "pending resolution of the state court action." (Cert. App. A38)[17] At the time the district court so ruled there was no state court action pending. Under these circumstances the stay order of the district court was properly treated by the Court of Appeals for the Fourth Circuit as appealable under § 1291.[18]

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[17]The federal courts of appeals have consistently held that decisions of federal district courts denying petitions to compel arbitration filed under § 4 of the Federal Arbitration Act are appealable under 28 U.S.C. § 1291. 9 *Moore's Federal Practice* ¶ 110.20 [4.-1] (1) (1982). Similarly, dismissal of a petition under § 4 is appealable. *Bio-Analytical Services, Inc. v. The Edgewater Hospital,* 565 F.2d 450 (7th Cir. 1977), *cert. denied,* 439 U.S. 820; *cf. Colorado River Water Conservation Dist. v. United States, supra.*

[18]The Fourth Circuit was unanimous that the case was properly appealable under § 1291.

A. *The stay order of the district court was an effective dismissal.*

The Fourth Circuit has recognized that "an order staying proceedings pending the termination of similar proceedings in another court is, in the usual case, not appealable," but that a stay order is appealable when it "amount[s] to a *dismissal* of the proceedings." *Amdur v. Lizars*, 372 F.2d 103, 106 (4th Cir. 1967).[19] Other circuits have held stay orders appealable as final orders under 28 U.S.C. § 1291.[20] The approach of the Fourth Circuit with respect to the appealability of stay orders was particularly appropriate in circumstances involving the important federal right to the speedy enforcement of agreements to arbitrate.[21]

Petitioner selectively quotes from *Will* and then blithely says that "the district court here never reached the merits,

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[19]"A stay in deference to state court proceedings will usually have the same effect as a dismissal because of the effects of res judicata." Comment, Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Layout of Colorado River, 44 *U. Chi. L. Rev.* 641, 662 n. 143 (1977) cited by the court appeals in *Calvert*, 600 F.2d at 1235.

[20]See, *e.g.*, *Druker v. Sullivan* 458 F.2d 1272 (1st Cir. 1972); *Baltimore Bank v. Farmers Cheese Coop.*, 583 F.2d 104 (3d Cir. 1978) (district court order staying its proceedings pending the outcome of proceedings before a state agency); *Hines v. D'Artois* 531 F.2d 726 (5th Cir. 1976) (district court order staying proceedings until plaintiffs exhausted their administrative remedies); *Litton Systems, Inc. v. Southwestern Bell Tel. Co.*, 539 F.2d 418 (5th Cir. 1976) (district court order staying proceedings pending prior resolution of plaintiff's complaints by state and local regulatory bodies); *Kelley v. Metropolitan Co. Bd. of Ed.*, 436 F.2d 854 (6th Cir. 1979), *cert. denied*, 409 U.S. 1001 (stay of district court proceedings pending appeal of other case in Supreme Court); *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092 (9th Cir. 1976).

[21]Petitioner's reliance on *Acton Corp. v. Borden, Inc.*, 670 F.2d 377 (1st Cir. 1981) is misplaced. *Acton* involved a stay by one federal district court to permit *another federal district court* to decide the mechanics of arbitration. The dispute in *Acton* did not involve arbitrability per se. The parties agreed that arbitration was required, but disagreed on venue and the manner by which the arbitrator was to be chosen. The First Circuit noted that "the only injury that inability to appeal can inflict upon *Acton* is the need to litigate the issues of arbitrability in a different federal court." 670 F.2d at 380. In other words, the federal issue—arbitrability—would be litigated in a federal court. The First Circuit expressly distinguishes *Acton* from the instant case on that basis.

but was free to do so at any time upon motion." (Pet. Br. 24) The problem with Petitioner's simplistic statement and one of the reasons Petitioner misapplies *Will* is that a petition to compel arbitration is due expedited hearing and decision prior to any decision (by arbitration or otherwise) on the underlying controversy. Thus, if the North Carolina court had ruled adversely to Mercury on that issue, the petition to compel arbitration before the district court would have been mooted. To suggest that after a ruling on the issue of arbitrability by the North Carolina court Mercury could persuade the federal district court to reconsider the same issue defies logic and good sense. First, to protect itself Mercury would have to appeal the adverse decision to the court of appeals of North Carolina at the same time it sought relief in the federal district court. In such a situation would or could the federal district court stay the appeal? And would not the decision of the North Carolina court be *res judicata* or at least have collateral estoppel effect? Second, comity between federal and state courts is better served by having the district court decide the federal issue prior to and instead of a decision on that issue by the state court rather than risk the more severe prospect of a federal court's having to stay or overturn a prior state court decision.[22] All considerations of comity point toward the federal district court ruling when the *sole* issue involves the federal right to compel arbitration and the strong Congressional policy favoring arbitration.

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[22]Most likely the only avenue to a federal court would be by the discretionary writ of certiorari to this Court from a final decision of the North Carolina Supreme Court. That result would deny to parties to agreements to arbitrate, not only a hearing in the federal district court to enforce its 9 U.S.C. § 4 remedy, but also review by the federal courts of appeals. As noted by the Fourth Circuit, 664 F.2d at 937-8, the question is not whether the North Carolina court is bound to uphold the constitution or whether state court judges are competent, the question is whether this Court will uphold the "unflagging obligation of the federal courts to exercise the jurisdiction given them" (*Colorado River Water Conservation Dist. v. United States, supra*, at 417), particularly when the issue is a federal issue, governed by federal substantive law which the federal courts interpret and apply every day.

B. *The district court's order is appealable under Cohen.*

The district court's stay order is closely analogous to and should be appealable under the collateral order exception enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and reaffirmed in the recent cases of *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978)[23] and *Firestone Tire & Rubber Company v. Risjord*, 449 U.S. 368 (1981). As stated in *Livesay*, an appealable collateral "order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." 437 U.S. at 468.

Whether Mercury's petition to compel arbitration would be heard in federal court is a disputed question which the district court's order conclusively determined. If the stay order were reinstated by this Court, Mercury would not have its petition to compel arbitration decided by any court. That question is completely separate from the "merits" of the action whether one defines the merits as the issue of arbitrability or the underlying dispute between the parties. Needless to say, whether a party is entitled to have a ruling by a district court on a timely filed petition to compel arbitration is an extremely important issue in light of the Congressional policy favoring arbitration and the potential of arbitration for alleviating significantly the workload of both state and federal courts. Finally the district court's stay order would be effectively unreviewable on appeal after a decision by the state court. If this Court holds that until the district court formally dismissed Mercury's petition, no § 1291 appeal would lie, then the right of appeal would be meaningless be-

[23]Petitioner's reliance on *Livesay* is misplaced. There this Court rejected the so-called "death knell" exception whereby several courts of appeals were taking appeals of orders denying class action certification. This Court observed that despite denial of class certification the underlying cause of action being prosecuted by the individual or individuals seeking class certification still existed and was subject to resolution by the district court. In this case once the North Carolina court ruled on the issue of arbitrability there would be nothing left for the district court to decide.

cause at that point the North Carolina courts will have decided the issue of arbitrability. Thus, if there is to be federal appellate review of the district court's order, it can only be in this proceeding.[24]

C. *The district court's order was appealable under Gillespie.*

The approach of the Fourth Circuit is consistent with the mandate of this Court in *Gillespie v. United States Steel Corp.* that

> Our cases long have recognized that whether a ruling is "final" within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a "practical rather than a technical construction" [citation omitted] . . . pointing out that in deciding the question of finality the most important competing considerations are "inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other hand" [citation omitted].

Id. at 152. This Court obviously did not intend and the various courts of appeals have not interpreted *Gillespie* as an invitation to avoid the finality requirement of § 1291 and permit wholesale appeals. Rather, the courts of appeals have relied on *Gillespie* only in limited circumstances.[25]

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[24]The Hospital's suggestion that Mercury should have requested certification of the stay order under 28 U.S.C. § 1292(b) is not pertinent or persuasive. First, under the prevailing rule in the court of appeals, the order appeared to be appealable under § 1291. Second, certification is totally discretionary with the trial judge. A court which declined to rule on a fully briefed petition to compel arbitration is very unlikely to certify an interlocutory appeal and no appeal would lie from that decision. Third, petitioner attempted to push for a decision in state court as soon as the stay order was entered. Had Mercury awaited a certification ruling, it might have been too late.

[25]*See, e.g., Freeman v. Califano*, 574 F.2d 264, 267 (5th Cir. 1978) (citing *Gillespie* and nothing that "this court has long followed the

This case, involving application of the Federal Arbitration Act, presents exactly the type of situation addressed by this Court in *Gillespie*. "Congress intended by the Arbitration Act to create a new body of federal substantive laws affecting the validity and interpretation of arbitration agreements," *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959) *cert. dismissed*, 364 U.S. 801 (1960) and in § 4 of that Act Congress provided parties seeking to enforce agreements to arbitrate a federal statutory remedy. Petitions under § 4 can only be filed in federal district court and are limited to the issue of whether a party should be required to arbitrate. Such petitions are regularly submitted to federal district courts, there is a substantial body of federal substantive law dealing with such petitions, and such petitions are required to be, and are routinely handled on an expedited basis by federal courts.[26]

As Professor Moore states in commenting favorably on *Gillespie:*

> Close questions of appealability may oblige a court of appeals to consider the record extensively. It would be stultifying to hold that it is utterly without power to speak unless it first determines the jurisdictional question favorably. The final judgment rule is aimed at the evil of piecemeal appeals. But once an appeal has been taken in good faith, and the attendant expense of time, money and manpower has been suffered, a court of ap-

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flexible, practical approach to finality"); *Wescott v. Impresas Armadoras, S.A., Panama*, 564 F.2d 875, 880-81 (citing *Gillespie* and holding "'we are persuaded that the facts of this case fall within the range of situations contemplated by *Gillespie*"); *Commonwealth v. Tenneco, Inc.*, 538 F.2d 1026 (4th Cir. 1976); and *United States v. 58.16 Acres of Land, etc.*, 478 F.2d 1055, 1061 (7th Cir. 1973) (after discussing *Gillespie* held "we think this pragmatic approach should apply to the instant situations").

[26]*See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co., supra; Sumitomo Corp. v. Parakopi Compania Maritime*, 477 F. Supp. 737, 742 (S.D.N.Y. 1979) (noting that "federal courts have refused to permit a party to a contract to circumvent an arbitration clause by commencing litigation in a state court"); *Commonwealth Edison Co. v. Gulf Oil Corp.*, 400 F. Supp. 888, 890 (N.D. Ill 1975), *aff'd*, 541 F.2d 1263 (6th Cir 1976); *Burger Chef Systems, Inc. v. Baldwin Inc.*, 365 F. Supp. 1229 (S.D.N.Y. 1973).

peals is not powerless to prevent further useless expenditures.

9 *Moore's Federal Practice* ¶ 110.12, p. 151 (1982). Professor Moore's comments are appropriate for this case. First, while we believe the Fourth Circuit's approach was correct, at worst the question of appealability falls "within the 'twilight zone' of finality." Second, the Fourth Circuit examined the record extensively before taking the appeal. Third, we assume no one questions the "good faith of the court of appeals in taking the appeal." Fourth, the issue involving the strong federal policy favoring arbitration was so "fundamental . . . that both policy and common sense . . . dictate that" the court of appeals accept the appeal. *Smith v. Eggar*, 655 F.2d 181, 185-5 (9th Cir. 1981); see also, *Coopers & Lybrand v. Livesay*, *supra*, at 476 n. 30. Finally, but for the grant of certiorari by this Court, the decision of the Fourth Circuit would have rendered unnecessary any further proceedings in the district court, would have remitted the parties to arbitration as they agreed and would have left to the North Carolina court the claims of the Hospital against its Architect.

D. *The practical and policy considerations strongly favor an appeal to preserve the Section 4 right to compel arbitration.*

The Hospital's suggestion that the North Carolina court is the more appropriate court to decide the issue of arbitrability because it has all parties before it is a classic "red herring." Throughout its brief the Hospital glosses over the fact that § 4 of the Federal Arbitration Act provides a federal statutory remedy by implying that the parties and evidence required for a ruling on the issue of arbitrability are the same as those for a complete resolution on the merits of the state court suit. That position is not only misleading, it is wrong. First, the only issues to be decided under § 4 are the existence of the agreement to arbitrate[27] and the failure

[27] The defendant to a petition to compel arbitration can challenge the existence of the agreement to arbitrate. However, in this case Petitioner acknowledges the agreement to arbitrate.

of the party in default — in this case the Hospital — to arbitrate.[28] Neither of these issues is, or can be, contested by the Hospital. Second, the Hospital attempted to raise as defenses untimeliness, waiver, and laches,[29] but, as the Fourth Circuit held, the federal cases make clear that decision on those issues "(as distinguished from inconsistent legal action . . . which . . . is for the court) is for the arbitrator and may not be an excuse for non-arbitrability." 656 F.2d at 942.[30] Third, the Architect *was not* a party to the agreement to arbitrate and therefore the Architect cannot be a party to any arbitration proceedings.[31] The Hospital may well now wish it had made its Architect a party to the agreement to arbitrate, but that failure is no basis for, in effect, arguing that arbitration is not appropriate because the Architect will not be a party to the arbitration proceeding. The federal cases have "uniformly held that the arbitrability of the arbitratable claim is not to be defeated or delayed because it is joined in the litigation with other issues not subject to arbitration." 656

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[28]In the words of the Fourth Circuit, "nor can [the Hospital] contest the fact that it has refused to arbitrate the dispute with Mercury." 656 F.2d at 942.

[29]Petitioner's position is a monument to the ingenuity of its lawyers, since the Petitioner acknowledges that it was in negotiations with respect to the claims it now asserts Mercury failed to pursue.

[30]To the same effect, see, *e.g., O'Neal v. National Ass'n. of Securities Dealers, Inc.*, 667 F.2d 804 (9th Cir. 1982); *N&D Fashions, Inc. v. DHJ Industries, Inc.*, 548 F.2d 722, 728 (8th Cir. 1976); *County of Middlesex v. Gevyn Const. Corp.*, 450 F.2d 53, 56 (2d Cir. 1971), *cert. denied*, 405 U.S. 955; *Halcon International, Inc. v. Monsanto Australia, Ltd.*, 446 F.2d 156, 160-63 (7th Cir 1971) *cert. denied*, 404 U.S. 949 (". . . laches is to be determined by the arbitrators"); *Trafalgar Shipping Co. v. International Milling Co.*, 401 F.2d 568, 572 (2d Cir. 1968) ("Laches . . might be resolved better where resort is had to the expertise of the arbitrators"); *Janmort Leas, Inc. v. Econo-Car Intern.*, 475 F. Supp. 1282, 1290 (E.D.N.Y. 1979). Since these defenses of the Hospital are to be weighed by the arbitrator, the Hospital's contention that it was deprived of an opportunity to present evidence or argument in support thereof is specious.

[31]In discussing the policy behind 18 U.S.C. § 1441 (c) petitioner says that the joinder of the Architect, a local party, reduces the likelihood of local prejudice in the instant case. Since the Architect is not a party to the agreement to arbitrate and will not be a party to any determination of the issue or arbitrability, that analysis is clearly faulty.

F.2d at 940.[33] If testimony of the Architect is required in connection with a hearing on the issue of arbitrability such testimony can be gained either by appearance at the hearing, deposition or affidavit.

The stay by the district court exposed Mercury to "the danger of denying justice by delay" (*Dickinson v. Petroleum Conversion Corp., supra,* at 511) and certainly did not meet the "unmistakably clear Congressional purpose that the arbitration procedure, where selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp v. Flood & Conklin Mfg. Co., supra,* at 404. In such circumstances, it was correct and appropriate for the Fourth Circuit to accept the appeal and to enforce expeditiously the Congressional policy favoring arbitration. The maneuvers of the Hospital in this case and in the state court case present a compelling example of the obstacles and interminable delays frequently encountered by a party seeking to enforce what otherwise appears to be a simple agreement to arbitrate. To repeat Judge Kaufman's observations in *Standard Chlorine of Delaware, Inc. v. Leonard, supra,* at 305:

> Arbitration is often thought of as a quick and efficient method for determining controversies. Unfortunately, cases involving arbitration clauses sometimes are best remembered as monuments to delay because of the litigation and appeals antecedent to the actual arbitration.

This Court can do much to eliminate the tactical maneuvers frequently undertaken by parties seeking to resist arbitration by holding that federal district courts are required to rule on petitions filed under § 4 of the Federal Arbitration Act and by further holding that a decision by a federal district court which denys or avoids ruling on and thereby in effect

[33]To the same effect, see, *e.g., Dickinson v. Heinold Securities, Inc.,* 661 F.2d 638 (7th Cir. 1981); *Sibley v. Tandy Corp.,* 547 F.2d 286, 287 (5th Cir. 1979) *cert. denied,* 434 U.S. 824; *Sam Reisfeld & Son Import Co. v. S. A. Eleco,* 530 F.2d 679, 681 (5th Cir. 1976); *Maldonado v. PPG Industries, Inc.,* 514 F.2d 614, 616-17 (1st Cir. 1975); *Janmort Leas, Inc. v. Econo-Car Intern.,* 476 F. Supp. 1282, 1290 (E.D.N.Y. 1979).

denies a petition under § 4 of the Federal Arbitration Act is appealable under § 1291.[33]

The Hospital's suggestion that this Court should reverse the Fourth Circuit in order to relieve the workload of courts of appeals is misdirected at best. First, the statistics cited deal with all appeals, the vast majority of which do not relate to appeals of district court stay orders.[34] Second, the Hospital, in effect, says that the courts of appeals should not be trusted with responsibility "to resolve . . . marginal cases coming within what might well be called the 'twilight zone' of finality." Instead, the Hospital urges this Court to lay down absolute rules for the courts of appeals, even though this Court for many years has acknowledged that there are cases where finality under § 1291 is "so close a question that decision of that issue either way can be supported with equally forceful arguments." *Gillespie v. United States Steel Corp., supra* at 152. Within the "practical" standards of *Cohen, Gillespie* and similar cases the courts of appeals have been and are perfectly capable of resolving the infrequent cases that present the issue of finality under § 1291. This is exactly what the Fourth Circuit did in the instant case. Third,

[33]While not an issue before this Court, the Court would lessen such avoidance techniques by a clear holding that the Federal Arbitration Act is the supreme law of the land, that the Federal Arbitration Act is due to be enforced by state courts in those instances where jurisdiction does not lie in the federal district courts and that state courts are bound by federal court precedent in interpreting and applying the Federal Arbitration Act.

[34]Mercury is not aware of any state courts complaining that their case load is too light. In fact in many areas, such as Birmingham, Alabama, the federal district courts are far more current in their dockets than are the state trial courts. Using a stay to force a litigant properly in federal court to litigate its federal right in state court denies the litigant its Congressionally guaranteed access to the federal courts and denies such litigant the right to have its federal right decided by a court steeped in the applicable federal law. Furthermore, by staying its proceedings the federal court is at least in part "managing" the state court's dockets as well as its own. This is not a case, such as *Colorado River*, where one or more states are actively expressing an interest in having the state court decide the issue. Here the state court suit was a tactic by the Hospital designed to avoid the Federal Arbitration Act and avoid arbitration.

the position that the courts of appeals should be denied the right and ability to manage their dockets is in sharp contrast to the Hospital's position that district courts should be given unfettered discretion under the guise of managing their dockets to avoid "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" (*Colorado River Water Conservation Dist. v. United States, supra*, at 817) by staying federal proceedings based on a federal statutory remedy. As shown at Part I of this Brief, the Hospital is asking this Court to make a quantum leap from the "considerably more limited circumstances than appropriate for abstention" criteria set forth in *Colorado River. Id.* at 878. However, the point with regard to appealability is that if the district courts are to be afforded the limited latitude provided in *Colorado River*, then the proper administration of justice and the protection of the rights of litigants requires that the courts of appeals continue to have the right and ability to give the "requirement of finality . . . a 'practical rather than a technical construction'." *Gillespie v. United States Steel Corp., supra*, at 152.

E. *Even if the district court order were not appealable, mandamus would be appropriate.*

Mercury did ask for appellate review by writ of mandamus as an alternative to a § 1291 appeal. Under the circumstances of this case mandamus should clearly lie if the district court's order is found not appealable. The chief impediment to review by mandamus is certain language in the plurality opinion in *Will*. However, the facts in *Will* were such that the case should not support a general proscription against use of the writ to review stay orders. First, the plurality opinion makes clear that there was no stay order of the petitioner's exclusively federal claim. Second, in *Will* the party seeking mandamus had delayed inordinately before filing a federal court action and had failed to remove a clearly removable action with the result that the state court had already ruled on a number of key issues. Third, on remand

the trial court and the Seventh Circuit held that the federal securities claim was made in bad faith to delay entry of judgment in the state court action. None of those factors are present here. Under the Federal Arbitration Act, Mercury has a clear right to a prompt ruling by this district court on its petition to compel arbitration. The failure of a district court to exercise its authority when it is its duty to do so has always been an appropriate ground for issuance of a writ of mandamus. *Cotler v. Inter-County Orthopaedic Ass'n.*, 526 F.2d 537 (3d Cir. 1975); *State Farm Mutual Automobile Ins. Co. v. Scholes*, 601 F.2d 1151 (10th Cir. 1979). Thus, this Court, even if it holds the stay order not appealable, should affirm the court of appeals' disposition of the case by issuing a writ of mandamus.

III. The procedures followed by the court of appeals were correct and appropriate.

Congress in § 4 of the Federal Arbitration Act provided that, faced with a refusal to comply with an agreement to arbitrate, the court shall hold a prompt hearing and, where appropriate, compel the defaulting party to arbitrate. The court of appeals honored this policy by giving expedited treatment to Mercury's appeal, consistent with Rule 2 of the Federal Rules of Appellate Procedure. The Hospital was afforded the opportunity to express its position to the court in two oral arguments, a written brief, and a detailed petition for rehearing and should not now be heard to claim that it was denied the opportunity to be heard.[25] After fully con-

[25]The alleged procedural irregularities are raised now only because the Hospital is dissatisfied with the decision. At a hearing before a three-judge panel, the district judge's order was fully argued by both sides. That panel requested the submission of simultaneous briefs, thereby giving the Hospital opportunity to put its arguments in writing. After review of the briefs, the Fourth Circuit sitting *en banc*, heard arguments, thus allowing the Hospital a second opportunity to argue its positions. In addition, the Hospital submitted an extensive and detailed petition for rehearing. Finally, the Hospital could have requested, either at the second oral argument or by motion the opportunity to submit additional briefs, but no such request was made.

sidering the positions of both parties, the court of appeals found that the district court had erred and that Mercury was entitled to an order compelling arbitration. The order of the court of appeals is due to be affirmed by this Court.

Federal Rules of Appellate Procedure, Rule 2 provides:

> In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

The Notes of the Advisory Committee on Appellate Rules say this about Rule 2:

> The primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules.

Clearly the Appellate Rules contemplate that a court of appeals may — on its own motion — hear and decide cases on an expedited basis, without adhering to the usual briefing schedule. In *Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158 (5th Cir. 1969), *cert. denied*, 394 U.S. 1012, the court noted that this is "a time when courts are everywhere importuned to exhaust fully all imaginative resources of judicial inventiveness" and found that nothing in the constitutional concept of due process forbids summary disposition "without all the marks of a traditional submission." 406 F.2d at 1162. Such practice is consistent with summary proceedings before this Court where, based only on the parties' briefs seeking and opposing certiorari and without oral argument, this Court issues appropriate decisions.

Despite having specifically dealt with the merits of the arbitrability issue in its briefs and arguments to the court of appeals, the Hospital complains that the court should not have ruled on the petition to compel arbitration. The Federal Arbitration Act requires the court to order the parties to

proceed to arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. The existence of the agreement to arbitrate was not contested in this case. Moreover, ample uncontested evidence of the Hospital's failure to comply with the arbitration agreement was before the court. Indeed, it is difficult to imagine more striking evidence of a failure to arbitrate than the Hospital's conduct in this case, including its securing an *ex parte* injunction to prevent arbitration. Finally the defenses raised by the Hospital under federal standards went to the merits of the underlying dispute, not to arbitrability.[36]

Petitioner's argument that it has been deprived of a jury trial strains credibility. The Hospital's defenses do not under federal standards invoke the right to a jury trial under the act. Moreover, it is interesting that the Hospital in state court has filed a motion seeking to have Mercury's right to arbitrate disposed of by summary judgment. In summary, § 4 of the Federal Arbitration Act provides for a jury determination *only* "if the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue," 9 U.S.C. § 4. The Hospital cannot now seriously assert that either the making of the agreement to arbitrate, or its failure to comply therewith is at issue.

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[36]While baseless, the Hospital's assertions with respect to the timeliness of Mercury's arbitration demand are to be resolved by the arbitrator once arbitration has commenced. See, *e.g.*, *Conticommondity Services, Inc. v. Phillip & Lion*, 613 F.2d 1222 (2d Cir. 1980); *N&D Fashions, Inc. v. DHJ Industries, Inc.*, 548 F.2d 722 (8th Cir. 1976); *Halcon International, Inc. v. Monsanto Australia, Ltd.*, 446 F.2d 156 (7th Cir. 1971), *cert. denied*, 404 U.S. 949. Of course, many cases recognize the right of a party to a contract to arbitrate a dispute long after the contract's expiration. *E.g.*, *Necchi v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 603 (2d Cir. 1965), *cert. denied*, 383 U.S. 909; *World Brillance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362 (2d Cir. 1965); *Monroe Sander Corp. v. Livingston*, 377 F.2d 6 (2d Cir. 1967), *cert. denied*, 389 U.S. 831.

CONCLUSION

Affirmance of the Fourth Circuit's ruling will leave the parties where the Hospital elected to put them when it drafted the contract—before the arbitrators. Affirmance will further serve to reduce resort to courts, state and federal, and will give the lower courts a clear guide to *Colorado River* in the arbitration context.

A. H. Gaede, Jr.
Attorney for Respondent
Bradley, Arant, Rose & White
1400 Park Place Tower
Birmingham, Alabama 35203
Telephone (205) 252-4500

CERTIFICATE OF INTEREST

Respondent Mercury Construction Corporation is a wholly owned subsidiary of Blount International, Ltd. Blount International, Ltd. is a wholly owned subsidiary of Blount, Inc., which is listed on the American Stock Exchange.

Petitioner's Reply Brief

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No. 81-1203

IN THE

Supreme Court of the United States

October Term, 1981

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Petitioner

v.

MERCURY CONSTRUCTION CORPORATION,
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

Jack W. Floyd
SMITH MOORE SMITH SCHELL & HUNTER
Post Office Box 21927
Greensboro, North Carolina 27420
(919) 378-1450
Attorney for Petitioner

OF COUNSEL:

Stephen P. Millikin
Douglas W. Ey, Jr.

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REPLY BRIEF

ARGUMENT

I. THE FEDERAL COURTS ARE NOT THE EXCLUSIVE FORUM FOR ADJUDICATION OF RIGHTS UNDER THE FEDERAL ARBITRATION ACT.

The foundation for Mercury's argument that the district court's stay order was improper is the recurrent assertion that only federal courts are empowered to compel arbitration under the Federal Arbitration Act. (Resp. Br. 8, 10, 11, 14, 20-22, 28, 31) This position is untenable.

The Federal Arbitration Act contains a comprehensive mechanism for resolving arbitrability issues. When a civil suit in state or federal court raises any issue referable to arbitration, a party desiring arbitration may apply for a stay of "the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. When no civil action is underway, a party desiring to arbitrate may institute an action seeking an order compelling arbitration. 9 U.S.C. § 4. This Court has held that the determinations made under Section 3 and Section 4 are identical, conclusively resolving the arbitrability question. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), defendant applied for a Section 3 stay of a federal civil action pending arbitration. In determining that a stay was proper, the Court looked to Section 4 for guidance as to Congressional intent. The Court stated:

> Section 4 does not expressly relate to situations like the present in which a stay is sought of a federal action in order that arbitration may proceed. But it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court. We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of

the agreement to arbitrate.[1]

388 U.S. at 404.

Thus, Congress intended that identical considerations resolve the arbitrability issue, whether raised by a defendant under Section 3 or by a plaintiff under Section 4.

Mercury states that it would seek a stay of the state court action under Section 3, if required to proceed in state court. (Resp. Br. 11 n. 9) Instead of proceeding in accordance with the statutory scheme from the outset, Mercury chose to file the duplicative Section 4 proceeding in federal court. Mercury protests that the relief available in state court under Section 3, if granted, does not require arbitration. (Resp. Br. 8, 11, 20) This argument ignores the plain language of Section 3, which permits a court to stay an action "until such arbitration has been had in accordance with the terms of the agreement." The contention that a Section 4 action to compel arbitration is necessary, even after a Section 3 stay of a pending action has been entered, is clearly contrary to the statutory scheme and would lead to wasteful, duplicative and potentially conflicting adjudications of arbitrability questions. The entry of a stay order directs the parties to arbitrate. In *Barge "Anaconda" v. American Sugar Refining Co.*, 322 U.S. 42, 45 (1944), the Court pointed out that when a stay has been entered, the party seeking relief will never obtain it without proceeding to arbitration. Relying on *Barge "Anaconda"*, the court in *Metropolitan World Tanker Corp. v. P. N. Pertambangan Minjakdangas Bumi Nasional*, 427 F. Supp. 2 (S.D.N.Y. 1975), specifically found that "Section 3 provides for a stay of proceedings pending arbitration, but such stay is clearly a remedy intended for a defendant who wants to compel plaintiff to arbitration . . . ." 427 F. Supp. at 4. State and federal courts

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[1] The Court refers specifically to federal courts only because the Section 3 motion to stay had been filed in a federal court.

entering stays under Section 3 have not hesitated to direct the parties to arbitrate.[2] Thus, Mercury's claims that relief under Section 3 is inadequate and substantively different from that available under Section 4 have no foundation.

Mercury also urges that federal courts should have exclusive jurisdiction to compel arbitration because they address questions arising under the Act more frequently. (Resp. Br. 19, 21, 31) This argument is a thin veil for the contention that state courts are less competent than federal courts to apply the Federal Arbitration Act. This contention is inappropriate. In *Defiance Water Co. v. Defiance*, 191 U.S. 184 (1903), this Court stated that "the state courts are perfectly competent to decide Federal questions arising before them, and it is their duty to do so." 191 U.S. at 193-94. Thus, the presumption is that state courts possess concurrent jurisdiction over claims arising under federal law. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). In the arbitration context, the district courts have jurisdiction over Section 4 actions when an independent basis of federal jurisdiction exists. *Commercial Metals Co. v. Balfour, Guthrie & Co.*, 577 F.2d 264, 268 (5th Cir. 1978). "It is black letter law, however, that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Gulf Offshore Co. v. Mobil Oil Corp., supra*, 453 U.S. at 479. Congress has demonstrated that when it chooses to make

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[2] *See, e.g., Romnes v. Bache & Co.*, 439 F. Supp. 833, 840 (W.D. Wis. 1977) ("While the defendant has not requested the Court to refer this matter to an arbitrator, such request is implicit in its motion for a stay of further proceedings."); *Burke County Pub. Schools Bd. of Educ. v. Shaver Partnership*, 303 N.C. 408, 279 S.E. 2d 816, 825 (1981) ("[T]he contract in question must be submitted to arbitration pursuant to the federal act."); *Pinkis v. Network Cinema Corp.*, 9 Wash. App. 337, 512 P.2d 751, 757 (1973) ("The civil action commenced in the courts of this state is stayed and arbitration of the issues raised in the amended complaint of the plaintiff may proceed.").

federal jurisdiction exclusive, it will do so explicitly. *See, e.g.*, 18 U.S.C. §3231 (federal offenses); 28 U.S.C. §1333 (admiralty actions); 28 U.S.C. §1338 (a) (patent and copyright actions). Section 4, in contrast, is worded permissively: a party "may petition" a district court for an order compelling arbitration.[3] Congress clearly intended that state courts have concurrent jurisdiction to require arbitration under Sections 3 and 4 of the Act.[4]

In its Brief, Mercury propounds an extremely narrow view of the scope of this litigation, focusing exclusively on the arbitrability question. Mercury, Hospital and the architect were the principal participants in a complex construction project. Each was involved integrally in all of the disputes and claims arising during the project. Hospital contends that

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[3] The language of Section 4 is analogous to that of Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185 (a), which states that suits by and against labor organizations "*may* be brought in any district court of the United States having jurisdiction of the parties...." Under this provision the state courts have concurrent jurisdiction to apply federal labor law. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). Mercury's arguments that Section 3 and Section 4 are substantively distinguishable and that only a federal court can compel arbitration under Section 4 undercut the Act's purpose of making written arbitration agreements in contracts involving commerce enforceable. 9 U.S.C. § 2. Under Mercury's theories, a party to an arbitration agreement could never obtain an order compelling arbitration against a resident of the same state because access to federal court would be unavailable.

[4] In addition to the multiple considerations addressed above, direct authority is provided in *Commercial Metals Co. v. Balfour, Guthrie & Co., supra:* "It is clear that the state courts are entirely able, as well as required, to apply the United States Arbitration Act and compel arbitration pursuant to the Act if the statutory requisites are present." 577 F.2d at 269. Review in this Court on questions of substantive federal law decided by state courts is available to insure uniformity. *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656, 665 (1961); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 362 (1959).

delays complained of by Mercury were caused not by Hospital, but by Mercury and the architect. Furthermore, Hospital contends that Mercury's assertion of cumulative delay claims arising during construction long after completion of the project prejudicially violates the contractual dispute resolution mechanism, which requires the architect to decide claims as they arise.[5] The arbitrability question is a part of the litigation, but is not dispositive of all questions. It is important to recognize that even if a court were to order arbitration between Mercury and Hospital, the architect's rights and liabilities must at some point be determined.[6] The architect can only be a party to the state action. Hospital could obtain a comprehensive declaration of its rights only by joining both Mercury and the architect in state court.[7] Hospital's argument that the stay prevents

[5] Mercury's failure to abide by the contract provisions for resolution of disputes and claims causes there to be no agreement to arbitrate and no failure by Hospital "to comply therewith." Contrary to Mercury's assertion (Resp. Br. 39), Hospital contends that the "making of the agreement" to arbitrate and the "failure to comply therewith" are very much in issue. Hospital outlines its contentions on the substantive arbitrability question in more detail at pages 32-34 of its Brief.

[6] For example, the architect contends that its disputes with Hospital are subject to arbitration, and has filed a motion under the Federal Arbitration Act in the state court action seeking a stay of the litigation pending arbitration. The arbitrability question as between Hospital and the architect can be resolved only in state court.

[7] Thus, Mercury's accusations that Hospital joined the architect as a defendant in the state action to prevent removal are unfounded. (Resp. Br. 19 n. 14, 21) Moreover, Mercury's references to the architect as the "agent" of the Hospital (Resp. Br. 19, 21) fail to recognize that the architect's authority is strictly limited. With respect to the architect's function as judge of disputes arising during the progress of the work, the architect was not the agent of either Mercury or Hospital. *E. C. Ernst, Inc. v. Manhattan Const. Co.*, 551 F.2d 1026, 1032-34 (5th Cir. 1977), *cert. den.*, 434 U.S. 1067 (1978). Further, the architect had no authority to waive claim and dispute resolution provisions of the Mercury/Hospital contract designed to protect Hospital. *Kirk Reid Co. v. Fine*, 205 Va. 778, 139 S.E.2d 829 (1965); *Bono v. Universal Tank & Ironworks, Inc.*, 395 S.W.2d 330 (Ark. 1965). The contract required a signed written amendment to effect any modification of its terms. (General Conditions §§ 1.1.1 and 1.1.2, Exhibit 3 to Nov. 17, 1980 Bettis Affidavit)

piecemeal litigation was neither an "overstatement" nor "misleading" as Mercury asserts. (Resp. Br. 20)

In sum, Mercury's attempt to justify filing the duplicative federal action by claiming that it is "entitled" (Resp. Br. 14), and has a " 'right' " (Resp. Br. 10), to have the federal court decide the arbitrability question is groundless. Mercury's right, and that of Hospital, is simply to have the arbitrability question heard and decided. This hearing is available as part of the state court litigation on Mercury's Section 3 motion to stay. Congress did not intend that Section 4 be used to institute duplicative litigation when a hearing in a pending case on a Section 3 motion would resolve the arbitrability issue. In this case, the Federal Arbitration Act requires resolution of that issue in the state court. The district court correctly determined that it was not compelled to proceed contrary to the statutory scheme and in blind disregard of duplication, inefficiency and potential inconsistency. [8] A state court with concurrent jurisdiction had previously assumed jurisdiction, and was in a position to resolve the arbitrability issue promptly, and all underlying disputes if necessary. By reversing the Fourth Circuit, this Court will reaffirm the district courts' power to manage their dockets effectively and in accord with Congressional intent.

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[8] Mercury's attempt to distinguish *E.C. Ernst, Inc. v. Potlatch Corp.*, 462 F.Supp. 694 (S.D.N.Y. 1978), the authority relied upon by the district court in entering the stay order, is ineffectual. (Resp. Br. 17 n.12) Convenience was clearly not the sole ground relied upon in *Ernst* to justify the stay. The *Ernst* court correctly interpreted *Colorado River* and *Will*, and exercised its discretion appropriately, as Judge Ward did in the instant case.

II. *GILLESPIE* DOES NOT SUPPORT APPEALABILITY OF THE STAY ORDER UNDER 28 U.S.C. § 1291.

Mercury contends that *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), authorizes an appeal of the stay order under § 1291. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Court severely limited the efficacy of *Gillespie:* "If Gillespie were extended beyond the unique facts of that case, § 1291 would be stripped of all significance." 437 U.S. at 476 n. 30. The instant case falls outside the strictly circumscribed scope of *Gillespie*. In *Coopers & Lybrand* the Court pointed out that in the unique factual context of *Gillespie*, "none of the policies of judicial economy served by the finality requirement would be achieved" had the case been returned to the district court with the substantive issue left undecided. *Id*. Policies of judicial economy are served in the instant case only by a finding of no appealability under § 1291.[9] Mercury complains that this Court's grant of certiorari has delayed determination of the arbitrability question (Resp. Br. 32), when in fact that question would have been resolved long ago in state court but for Mercury's filing of the federal action, its appeal of the stay order and the Fourth Circuit's appealability ruling. The district court's stay order promoted judicial economy. The Fourth Circuit's holding on appealability subverted it. *Gilles-*

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[9] The order denying class certification in *Coopers & Lybrand* and the stay order in the instant case are by nature discretionary: "[T]he indiscriminate allowance of appeals from such discretionary orders is plainly inconsistent" with the policies of judicial economy promoted by the limitations on appealability contained in § 1291 and § 1292 (b). 437 U.S. at 476 n. 30.

pie does not authorize Mercury's appeal under § 1291.[10]

III. MERCURY'S CHARACTERIZATIONS OF THE PROCEEDINGS IN THE FOURTH CIRCUIT AND THE COURSE OF DEALINGS BETWEEN THE PARTIES ARE INACCURATE.

Hospital pointed out in its Brief that the Fourth Circuit adjudicated matters not properly before it by deciding the arbitrability question. (Pet. Br. 30-32) Mercury's response that Hospital "specifically dealt with the merits of the arbitrability issue in its briefs and arguments to the Court of Appeals" is incorrect. (Resp. Br. 38) In accordance with the Statement of Issues to be Presented on Appeal filed by Mercury, only the question whether the district court properly entered the stay order was before the Fourth Circuit. (Cert. App. A46) Not until the Fourth Circuit issued its opinion did either party conceive that the arbitrability question was under consideration. Mercury's brief and supplemental brief in the Fourth Circuit stated in conclusory

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[10] As a factual predicate for its appealability argument, Mercury states that "there was no state court action pending" when the district court entered its stay order. (Resp. Br. 26) This is incorrect. The district court's stay order expressly refers to its order remanding Hospital's declaratory judgment action to the state court. (Cert. App. A38) Even when Mercury attempted to remove the case to federal court, jurisdiction in the state court was not totally extinguished. "It is well settled that jurisdiction once acquired by a state court is continuous though the case has been removed to the United States District Court and later remanded to the state court.... The effect of an order remanding is not to invest the state court with a new jurisdiction but merely to revive a jurisdiction previously acquired but held in abeyance." *Doerr v. Warner*, 247 Minn. 98, 106, 76 N.W.2d 505, 512 (1956). *See also Chandler v. O'Bryan*, 445 F.2d 1045, 1058 (10th Cir. 1971), *cert. den.*, 405 U.S. 964 (1972).

fashion that arbitration should be compelled, but without statement of reasons. Hospital's submittals to the Fourth Circuit addressed the substantive arbitrability question for the first time in the petition for rehearing. The arbitrability question was not decided in the district court and was not before the Fourth Circuit. The Fourth Circuit's ruling denied Hospital the opportunity to be heard on that question. Mercury's argument on this point is incorrect and misleading.

Moreover, Mercury attributes malevolent intentions to Hospital in filing suit in state court, placing great emphasis on its contention that "settlement negotiations" were underway. (Resp. Br. 3, 4, 10, 21, 25) A mere exchange of information by the parties concerning Mercury's claim has blossomed in Mercury's briefs (Resp. Br. 21) and the Fourth Circuit opinion, 656 F.2d at 944, into the untrue and unsubstantiated statement that Hospital had "negotiated for months" with Mercury prior to filing suit. Even the affidavit of Mercury's counsel, attached as Exhibit C to Mercury's Petition for Writ of Mandamus, is not susceptible of such a radical interpretation. Mr. Bynum's affidavit states that he was told the Hospital would "need additional information regarding the claim before undertaking negotiations in earnest." Mr. Bynum's affidavit shows that representatives of Mercury, Hospital and the architect met on August 12, 1980 to allow Mercury to explain its claims, but not that "negotiations" occurred or that "terms of settlement" were ever discussed by the parties or their representatives. Hospital has never "acknowledged" that negotiations took place (Resp. Br. 33 n. 29) and, in fact, none occurred. The statements throughout Mercury's Brief concerning "ongoing settlement negotiations" and "settlement conferences" (Resp. Br. at 3, 4, 10, 21, 25) are misleading, untrue and irrelevant, and should play no role in the Court's assessment of this case. As Judge Hall correctly pointed out in dissent below, "[t]he treacherous motives attributed to these acts is more likely a

conjecture stemming from the majority's hindsight than the reasoned product of the Hospital's foresight." 656 F.2d at 951 (Hall, J., dissenting). That statement, absent the "more likely" qualification, is true.

CONCLUSION

Hospital reiterates its prayer that the judgment of the Fourth Circuit be reversed and that the district court's order of stay be reinstated.

Jack W. Floyd
Attorney for Petitioner

SMITH MOORE SMITH
SCHELL & HUNTER
500 NCNB Building
Post Office Box 21927
Greensboro, North Carolina 27420
Telephone: (919) 378-1450

OF COUNSEL:

Stephen P. Millikin
Douglas W. Ey, Jr.

Docket Sheet

NO. 81-1203-CFX	TITLE	Moses H. Cone Memorial Hospital, Petitioner v. Mercury Construction Corporation

DOCKETED	COURT
Dec. 28, 1981	United States Court of Appeals for the Fourth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Jack W. Floyd
	Counsel for Respondent: A. H. Gaede, Jr.
Dec. 28, 1981	Petition for writ of certiorari filed.(Record filed).
Jan. 27, 1982	Brief for the respondent in opposition filed.
Feb. 3, 1982	DISTRIBUTED. 2-19.
Feb. 22, 1982	Petition GRANTED.

Apr. 7, 1982	Joint appendix filed.
Apr. 7, 1982	Brief for the petitioner filed.
May 11, 1982	Brief for the respondent filed.
Aug. 5, 1982	CIRCULATED.
Sept. 14, 1982	Reply brief for the petitioner filed. (D).
Nov. 2, 1982	ARGUED.